IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, | ) | S132449 |
| | ) | |
| Respondent, | ) | San Mateo No. 55500A |
| v. | ) | |
| SCOTT LEE PETERSON, | ) | |
| Appellant. | ) | |

# APPELLANT'S REPLY BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, San Mateo County

Honorable Alfred Delucchi, Judge


CLIFF GARDNER*
(State Bar No. 93782)
CATHERINE WHITE
(State Bar No. 193690)
LAZULI WHITT
(State Bar No. 221353)
1448 San Pablo Avenue
Oakland, CA 94702
Tel: (510) 524-1093
Fax: (510) 527-5812

* Counsel of Record

Attorneys for Appellant
Scott Lee Peterson

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# INTRODUCTION

The guilt phase in this case -- from opening statements to verdict -- lasted a full six months. The trial as a whole -- including jury voir dire and the penalty phase -- lasted approximately ten months. In a trial this long it stands to reason that mistakes can and will occur. After all, as the Supreme Court has noted, "there can be no such thing as an error-free perfect trial." (*United States v. Hasting* (1983) 461 U.S. 499, 508-509.) "[T]here are no perfect trials." (*Brown v. United States* (1973) 411 U.S. 223, 231-232.) "[A] search for the golden fleece of the 'perfect trial' is inevitably doomed to failure." (*People v. Phillips* (1985) 41 Cal.3d 29, 91 [Feinerman, J., concurring and dissenting].) In his opening brief Mr. Peterson recognized that he was not entitled to a perfect trial, only a fair one. He contended that because of various errors committed by the trial court, he did not receive the fair trial to which he was entitled.

The state has filed its 475-page Respondent's Brief. The state's initial position is that -- remarkably enough -- Mr. Peterson actually *did* receive a perfect trial. According to the state, at *no* point in *any* portion of this ten month trial did the trial court commit even a *single* error. (Respondent's Brief ("RB") 1-475.) The golden fleece has been found.

In the state's view, for example, the jury selection process was perfect -- the trial court committed no errors at all. Thus, it was entirely proper for the trial judge to discharge 13 jurors based solely on the judge's stated belief that "if you don't support the death penalty you cannot be death qualified." It was entirely proper to hold trial in a county where (1) 96% of the prospective jurors had been exposed to adverse publicity about the case, (2) 46% of that group admitted reaching a judgment about guilt *before hearing testimony from a single witness*, (3) 98.6% of those prospective jurors believed Mr. Peterson was guilty, and (4) more than half of this 98.6% conceded they would not set aside their views and judge the case based on the facts presented at trial.

The state takes the same approach to the six month guilt phase -- once again the trial court committed no errors at all. Thus, it was entirely proper to admit dog scent evidence based on a scenting technique that -- as discussed more fully below -- *had never before been admitted in any court in the country*. It was entirely proper to permit the state's acknowledged expert on *tides* to testify *not* about tides, but about the movement of bodies in water, even though the expert himself candidly conceded he was "not an expert in that area." It was entirely proper to admit *prosecution* testimony about stability experiments on a model of the boat Mr. Peterson owned -- performed in a freshwater Indiana swimming pool a full 25 years before trial -- while *excluding* defense testimony about stability experiments performed on the same model boat but done (1) in the actual

area of San Francisco Bay where the crime was alleged to have occurred, (2) at the same time of day as the crime was alleged to have occurred and (3) using mannequins and participants specifically sized to the actual weight of those alleged to have been involved. And having excluded such defense evidence in part because Mr. Peterson's actual boat had not been used, it was then equally proper for the trial court to refuse to allow the defense to use the actual boat for an experiment unless members of the prosecution team were there to personally observe any defense experiments.

These, and other, errors will be discussed in detail below. But it is important to note at the outset of this brief that contrary to the state's position, the trial in this case was certainly *not* perfect. Far from it.

Mr. Peterson will end this introduction where he began. "Although a defendant is not entitled to a perfect trial, he is entitled to a fair trial." (*People v. Jeff* (1988) 204 Cal.App.3d 309, 339.) The question for the Court to answer here should not be obscured by the state's insistence that no errors at all were made at trial and that this was the perfect trial. The real question for the Court is whether it can be said with any confidence that Mr. Peterson received a fair trial in light of those errors which *did* occur at trial.

It is to that question Mr. Peterson now turns. Given the exacting standards which must be applied to capital cases, and the nature of the numerous jury selection, evidentiary and instructional errors which occurred at trial, the answer to this question is clear. Reversal of both the penalty and guilt phases is required.

ARGUMENT

## ERRORS RELATING TO JURY SELECTION

### I. THE TRIAL COURT'S IMPROPER DISCHARGE OF THIRTEEN PROSPECTIVE JURORS OVER DEFENSE OBJECTION REQUIRES A NEW PENALTY PHASE.

#### A. Introduction.

During voir dire the trial court discharged 13 prospective jurors based entirely on their written answers to several questions on the jury questionnaire.[1] There was no questioning of any of these 13 prospective jurors. The jury questionnaire answers of each of these 13 jurors indicated (1) they were each opposed to the death penalty but (2) their views on capital punishment did *not* preclude them from imposing death.[2]

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[1] 12 RT 2384 [Juror 6284]; 14 RT 2715-2716 [Juror 6963]; 16 RT 3178-79 [Juror 27605]; 16 RT 3179-80 [Juror 4841]; 17 RT 3485-86 [Juror 29280]; 17 RT 3486 [Juror 593]; 21 RT 4245 [Juror 6960]; 23 RT 4469 [Juror 7056]; 24 RT 4770 [Juror 16727]; 28 RT 5485 [Juror 8340]; 32 RT 6384-85 [Juror 23873]; 34 RT 6672-73 [Juror 23916]; 38 RT 7861-62 [Juror 5909].

[2] 17 CT Hardship 4540, 4556-57 [Juror 6284]; 31 CT Hardship 8736, 8752-53 [Juror 6963]; 2 CT Hovey 72, 88-89 [Juror 27605]; 2 CT Hovey 210, 227 [Juror 4841]; 5 CT Hovey 923, 939-40 [Juror 29280]; 4 CT Hovey 854, 870-71 [Juror 593]; 8 CT Hovey 2027, 2043-44[Juror 6960]; 10 CT Hovey 2556, 2572-73, 2625, 2641-42 [Jurors 7056 and 16727]; 15 CT Hovey 4027, 4043-44 [Juror 8340]; 21 CT Hovey 5569, 5585-86 [Juror 23873]; 21 CT Hovey 5770-71 [Juror 23916]; 27 CT 7344, 7360-61 [Juror 5909].

There was no mystery as to the trial court's reasoning in discharging any of these 13 prospective jurors. In fact, the trial court put its reasons for discharging each of these 13 jurors on the record. As to each, the trial court stated that *Wainwright v. Witt* (1985) 469 U.S. 412 permitted their discharge based solely on their death penalty views:

> "[Juror 6963] [s]trongly opposes the death penalty. . . [H]e['s] going to fail Wainwright vs. Witt." (14 RT 2715.)
>
> "Let's see, [juror 6284] says he opposes the death penalty. I don't believe in the death penalty. . . . [H]e is opposed to the death penalty, so that eliminates the possibilities. It's a [W]ainwright v. Whit [sic] failure." (12 RT 2384.)
>
> "So let me read in to the record 27605, with respect to the death penalty, juror said strongly oppose the death penalty. Opposed to the death penalty. Response to question 106 [sic], what are your feelings regarding the death penalty. Against. So in the Court's opinion would not qualify under Wainwright versus Witt." (16 RT 3179.)
>
> "The answer on page 19, [question] 109, would you please rate your attitude toward the death penalty? Strongly opposed. So this juror [4841] also would not qualify." (16 RT 3180.)
>
> "I'm going to excuse juror number 29280 because this juror is opposed to the death penalty, and fails Wainwright v. Witt. 29280 is excused." (17 RT 3486.)
>
> "[I'm going to] excuse[] 6960 for cause because that juror is opposed to the death penalty, without reservation." (21 RT 4245.)
>
> "[Page] 19, [question] 109 says I don't believe in the death penalty, I oppose the death penalty. So [juror 7056] would not pass Wainwright v. Witt." (23 RT 4469.)

> "[Juror 16727] says: I am against the death penalty, I strongly oppose the death penalty. "I don't think this person would qualify because of his answers, and he's opposed to the death penalty." (24 RT 4770.)
>
> "And then juror number 8340 is also -- what are your feelings regarding the death penalty? Answer I feel strongly against this due to religious beliefs. . . . . 8340 may be excused. And the juror is excused because the juror's (sic) opposed to the death penalty on religious grounds." (28 RT 5485.)
>
> "[Juror 23873] says on [page] 19 . . . strongly opposes the death penalty. . . . 23873 will be excused." (32 RT 6384-6385.)
>
> "Juror number 593 . . . is opposed to the death penalty. . . . Strongly opposes. . . . I will excuse this juror for the reason he's opposed to the death penalty." (17 RT 3486.)
>
> "[I'm going to] excuse the juror for cause, because this juror opposes the death penalty, and is not qualifiable under Wainwright v. Witt. So 5909 is excused for cause." (38 RT 7862.)

Because defense counsel had a very different view of the *Witt* standard, he objected to each and every one of the court's discharges. He repeatedly advised the court that it was making a mistake because mere opposition to the death penalty was *not* a sufficient basis for discharging a juror. (14 RT 2715; 16 RT 3109, 3356.) Defense counsel explained that *Witt* permitted discharges only if a juror's death penalty views would prevent the juror from imposing death. (14 RT 2715; 16 RT 3109, 3356.)

The prosecutors stood mute. At no point during *any* of these exchanges did anyone on the prosecution team step up to the plate and say anything. At no point did

either of the prosecutors ever advise the trial court that its understanding of the *Witt* standard was wrong. Instead, the prosecution team permitted the trial court to discharge juror after juror simply because -- as the trial court put it -- "[u]nder Wainwright v. Witt, if you are opposed to the death penalty, you are not qualified to serve as a trial juror in this kind of case." (16 RT 3356.)

In his opening brief, Mr. Peterson contended that the trial court's interpretation of *Witt* was wrong, and the decision to discharge these 13 jurors violated the constitution. More specifically, he raised four separate contentions. The state has now responded. Although the state ultimately defends every one of the trial court's discharges, it concedes three of these four contentions.

First, because the trial court discharged these 13 jurors based entirely on their answers in the jury questionnaire -- without any voir dire -- the court's rulings were not entitled to deference but were instead subject to de novo review by this Court. (Appellant's Opening Brief ("AOB") at 104.) In this situation, the discharges may be upheld only if the written answers "leave[] no doubt" that the prospective juror cannot set aside his or her views and follow the law. (AOB 105, citing *People v. McKinnon* (2011) 52 Cal.4th 610, 643.) In several cases decided *after* Mr. Peterson's opening brief was filed, the Court has reiterated these principles. (*People v. Leon* (2015) ___ Cal.4th ___,

2015 WL 3937629 at * 13 ["Prospective jurors may be dismissed based on written questionnaire responses alone if the responses leave no doubt that their views on capital punishment would prevent or substantially impair the performance of their duties in accordance with the court's instructions and the jurors' oath."]; *People v. Riccardi* (2012) 54 Cal.4th 758, 779 ["In reviewing dismissals for cause based upon only written answers, we apply a de novo standard of review."].) In its brief the state concedes that (1) when a juror is discharged without voir dire -- but instead based solely on written answers in a jury questionnaire -- this Court's review is de novo and (2) discharge based on a jury

questionnaire is only permissible "where it is clear from the answers that [the prospective juror] is unwilling to . . . follow the law." (RB 175.)[3]

Second, a prospective juror may *not* be discharged simply because he or she is opposed to capital punishment, but only where the record shows the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance

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[3] To be sure, the state's concession on de novo review has a slight bait and switch quality to it. Although conceding that no deference is required (RB 175), the state then suggests the Court's de novo review is limited to "to determin[ing] whether the trial court's rulings were fairly supported by the record." (RB 175 citing *People v. Duff* (2014) 58 Cal.4th 527, 541.)

An inquiry into whether a trial court's decision is "fairly supported by the record" has nothing at all to do with de novo review. Instead, as this Court has repeatedly noted, the "fairly supported by the record" standard applies *only when deference to a trial court's decision is proper, and the decision is being reviewed for an abuse of discretion*. (*People v. Merriman* (2014) 60 Cal.4th 1, 50; *People v. Manibusan* (2013) 58 Cal.4th 40, 60.)

That was precisely the situation in *Duff*, the case on which the state now relies. (RB 175.) There, the trial court discharged a juror *after full voir dire*. Because there had been full voir dire, the Court looked to see if the discharge was "fairly supported by the record" noting that "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (58 Cal.4th at p. 541.) But here, there was no voir dire and -- as the state concedes -- no deference is warranted.

In short, de novo review means just that -- a review of the decision below without deferring to the legal conclusions made by the trial court. It is not, and never has been, the same as review under an abuse of discretion standard. The state's undoubtedly inadvertent invitation to engraft an abuse of discretion standard in place of de novo review should be declined.

with his instructions and his oath," and it is the state's burden to prove a juror meets the criteria for dismissal. (AOB 77-78, citing *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 421, 423-424.) The state properly concedes this as well in its brief. (RB 175.)

Third, the improper exclusion of even a single juror based on opposition to the death penalty requires a new penalty phase. (AOB 78, 107 citing *Gray v. Mississippi* (1987) 481 U.S. 648, 660.) In its brief, the state concedes that if the Court finds even a single juror was improperly discharged under *Witt*, a new penalty phase is required. (RB 195 [recognizing that "[u]nder existing United States Supreme Court precedent, the erroneous excusal of a prospective juror for cause based on that person's views concerning the death penalty automatically compels the reversal of the penalty phase without any inquiry as to whether the error actually prejudiced defendant's penalty determination."].)

Finally, in his opening brief Mr. Peterson conceded that the answers of the 13 jurors to questions 107 and 109 of the jury questionnaire showed that each of the 13 discharged jurors opposed (or strongly opposed) the death penalty. (AOB 79, 84-101, 106.) But he went on to note that each of these 13 jurors *also* answered question 115, explaining that their views would *not* make them "unable to impose the death penalty

regardless of the facts." (AOB 84-101, 106.) Thus, on the face of the jury questionnaires alone, none of these jurors was excludable under *Witt*.[4]

It is here that the state disagrees, making two arguments. First, the state argues the jury questionnaires actually do show that every one of the 13 jurors was unable to follow the law and consider death as an option. In other words, discharge under *Witt* was proper. (RB 180 [Juror 6963]; 183-184 [Juror 6284]; 184 [Juror 27605]; 185 [Juror 4841]; 186-187 [Juror 29280]; 187 [Juror 6860]; 188 [Juror 7056]; 189-190 [Juror 16727]; 190 [Juror 8340]; 191 [Juror 23873]; 192 [Juror 593]; 193-194 [Juror 23916] and 194 [Juror 5909].) As discussed in Argument I-B below, in making its arguments as to each of the 13 jurors the state has ignored (1) which party has the burden of proof and (2) each juror's explicit answer to question 115. In fact, (1) it is the state's burden to prove that these jurors were properly excluded under *Witt* and (2) not only is the state's suggestion that these jurors

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[4] *See* 2 CT Hovey 89 [Juror 27605]; 5 CT Hovey 940 [Juror 29280]; 8 CT Hovey 2044 [Juror 6960]; 10 CT Hovey 2573 [Juror 7056]; 10 CT Hovey 2642 [Juror 16727]; 15 CT Hovey 4044 [Juror 8340]; 21 CT Hovey 5586 [Juror 23873]; 17 CT Hardship 4557 [Juror 6284]; 4 CT Hovey 871 [Juror 593]; 21 CT Hovey 5771 [Juror 23916]; 31 CT Hardship 8753 [Juror 6963]; 2 CT Hovey 227 [Juror 4841]; 27 CT Hovey 7360-7361 [Juror 5909].

In addition, Mr. Peterson noted that none of these 13 jurors said that their religious or philosophical views would impede their ability to serve as jurors. (AOB 84-101, 106.) 2 CT Hovey 72 [Juror 27605]; 5 CT Hovey 923 [Juror 29280]; 8 CT Hovey 2027 [Juror 6960]; 10 CT Hovey 2556 [Juror 7056]; 10 CT Hovey 2625 [Juror 16727]; 15 CT Hovey 4027 [Juror 8340]; 21 CT Hovey 5569 [Juror 23873]; 17 CT Hardship 4540 [Juror 6284]; 4 CT Hovey 854 [Juror 593]; 21 CT Hovey 5754 [Juror 23916]; 31 CT Hardship 8736 [Juror 6963]; 2 CT Hovey 210 [Juror 4841]; 27 CT 7344 [Juror 5909].)

were unable to follow the law utterly unsupported by the actual record, the answers to question 115 affirmatively show that each juror *was* willing to set aside their views and consider death as an option.[5]

As to seven of these 13 jurors, the state makes a second argument, contending for the very first time that the jury questionnaires reveal other, different reasons on which the trial court *could* have relied if only the prosecutor had asked. (RB 179-182 [Juror 6963]; 183-184 [Juror 6284]; 185 [Juror 27605]; 189 [Juror 7056]; 191-192 [Juror 23873]; 192 [Juror 593]; 193 [Juror 23916].) As discussed in Argument C below, the state may not now rely on reasons which were never explored at trial.

B. The Juror Questionnaires Show That Although Each Of The 13 Prospective Jurors Were Opposed To The Death Penalty, Each Was Willing To Consider And Impose The Death Penalty.

The state defends the merits of the trial court's discharge of every one of the 13 prospective jurors identified in the opening brief. The state discusses each juror in turn. (RB 179-194.) Although the state's phrasing varies, the state argues -- as it must -- that

[5] Actually, the state's argument as to many of these 13 jurors is that the trial court's discharges were "supported by substantial evidence." (RB 179, 185, 187, 188, 190, 191, 192, 193, 194.) But as discussed above, this statement of the standard of review is simply wrong. In fact, as the state concedes elsewhere, the Court's review of the discharges of these jurors is de novo.

the jury questionnaires *alone* prove none of these 13 jurors could set aside their death penalty views and follow the law. (RB 180 [Juror 6963]; 183-184 [Juror 6284]; 184 [Juror 27605]; 185 [Juror 4841]; 186-187 [Juror 29280]; 187 [Juror 6860]; 188 [Juror 7056]; 189-190 [Juror 16727]; 190 [Juror 8340]; 191 [Juror 23873]; 192 [Juror 593]; 193-194 [Juror 23916] and 194 [Juror 5909].) Mr. Peterson will also discuss each juror in turn.

There is, however, a common element to the state's individualized discussion of each juror. As to every one, the state has omitted entirely the juror's answer to question 115 on the jury questionnaire. (RB 180, 183-184, 184, 185, 186-187, 187, 188, 189-190, 191, 192, 193-194.)

This is curious. After all, Mr. Peterson has conceded that each of these 13 jurors stated they were opposed to the death penalty. As such, the only question to be resolved in assessing the trial court's ruling is whether the state carried its burden of proving that each these prospective jurors was unable to set aside their death penalty views and consider death as an option.

As to this inquiry, question 115 was the most important question of all. Indeed, it was specifically designed to deal with this exact inquiry. After soliciting the views of

prospective jurors on the death penalty in questions 107 and 109 -- that is, whether they opposed or supported the death penalty and to what degree -- question 115 directly asked whether those prospective jurors who opposed the death penalty would still be able to consider imposing death:

> "115. Do you have any moral, religious, or philosophical opposition to the death penalty so strong that you would be unable to impose the death penalty regardless of the facts?
>
> ___ Yes ___ No
>
> If yes, please explain."

Suffice it to say here that each of these 13 jurors answered question 115 in the negative, assuring the court their views would *not* make them unable to consider death as an option. Given the state's burden to prove these 13 jurors could not consider death as an option because of their death penalty views, their direct answers to this very question deserve at least some discussion in connection with the state's individual discussion of each juror. Instead, their answers to question 115 were simply ignored.

There is a certain irony to the state's approach. After all, the state properly concedes that in performing its de novo review, this Court should "tak[e] the juror's questionnaire responses together." (RB 187.) Later, the state recognizes that the Court

should consider whether the jurors' "answers, taken together, demonstrate[] substantial impairment . . . ." (RB 192.) Yet in simply ignoring the answers to question 115 in its discussion, the state honors this approach more in the breach than in the observance.[6]

As discussed below, all 13 jurors made clear (1) they were opposed to the death

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[6] To its credit, however, the state does explain its decision to ignore the specific answers to question 115 in connection with its individual discussion of the 13 jurors. Thus, the state argues that answers to questions 115 are "perfunctory and unadorned responses" which are not entitled to any weight. (RB 176.) Accordingly, the state simply does not discuss these answers. (RB 178-194.)

The position is decidedly odd. In Argument III of his opening brief, Mr. Peterson contended an additional 17 jurors were improperly discharged under *Witt* despite affirmative answers to question 115 saying they *did* have moral religious or philosophical views which would make them unable to impose death. (AOB 117-127.) In responding, the state *relies* on the answers to question 115 to *uphold* the trial court's decision to discharge these jurors. (RB 206, 208, 209-211, 213-215, 217-218, 220-222.) As to these jurors, the state's position is that "[t]he questionnaire was sufficiently clear on the *Witherspoon-Witt* standard," "the wording of question 115 . . . would reasonably have been understood by the prospective jurors as an attempt to ascertain their willingness to consider voting to impose the death penalty under any circumstances," and "by the time the jurors reached question number 115, they were conditioned to accept the principle that following the court's instructions (i.e. the law) was of paramount importance if they were to serve as jurors in this case." (RB 205, 206, 207.)

In other words, where the answers to question 115 show that a juror would *not* consider death (as is the case in connection with the 17 jurors at issue in Argument III), these answers are entitled to great weight since -- after all -- question 115 conveys "the *Witherspoon-Witt* standard." But where the answers to this identical question show that jurors *would* consider death, the answers are "perfunctory and unadorned" and not entitled to *any* weight.

A venerable maxim about cake -- its possession and ingestion -- comes to mind.

penalty but (2) they would nevertheless consider the death penalty as an option. In light of question 115, if any conclusion is to be drawn from the questionnaires alone it is that each of these jurors could indeed set aside their views and follow the law. Nothing in the jury questionnaires comes anywhere close to "mak[ing] . . . clear . . . [that the jurors were] unwilling to temporarily set aside . . . [their] beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) Thus, while on this record it would certainly have been proper for the trial court to engage in further voir dire of these 13 jurors on their death penalty views, it was patently *improper* for the court simply to discharge them under *Witt* because of these views. (*See People v. Leon*, *supra*, 2015 WL 3937629 at * 13 [juror questionnaire answers of three prospective jurors showed they were opposed to the death penalty but could consider death under the trial court's instructions; held, "[b]ased on their written answers alone, these jurors appeared qualified to serve."].) As the following individual discussion of each of these 13 jurors shows, that is exactly the case here.

1. Juror 6963.

Although juror 6963 was "strongly opposed" to the death penalty, *in answer to question 115, he specifically stated he could consider death as an option*. (31 CT Hardship 8752-8753.) The trial court excused juror 6963 over defense objection because

he "[s]trongly opposes the death penalty" and "he's going to fail Wainwright v. Witt." (14 RT 2715-2716.)

Ignoring juror 6963's direct answer to question 115 and the court's explanation for the discharge, the state argues that the trial court properly discharged this juror under *Witt* because he "was 'strongly opposed' to the death penalty and wrote that he was "against it" and this was based on his "feelings against it." (RB 180, 181.) The state notes that discharge was proper because "there existed no conflict or ambiguity in this juror's attitude toward the death penalty." (RB 181.)

The state's factual observation is entirely correct -- there was no ambiguity in juror 6963's feelings about the death penalty. But contrary to the state's position, simply having an unambiguous opposition to the death penalty is *not* a permissible reason to discharge a juror and it never has been. The question is not whether the juror is unambiguously opposed to the death penalty, the question is whether the juror can set aside whatever views he or she has -- whether they are unambiguous or not -- and impose a death sentence. Put another way, if a juror cannot set aside his views and consider death, discharge under *Witt* is proper *regardless* of whether the juror's views were ambiguous or unambiguous. If the juror *can* set aside his views and consider death as an option, the juror may *not* be discharged under *Witt*. It is not the ambiguity of the views

that matters, it is the juror's ability to set those views aside.

And as to this critical inquiry, juror 6963's answer to question 115 unequivocally states that he *was* willing to consider death as an option. Thus, while juror 6963's questionnaire shows he was opposed to the death penalty, nothing in the questionnaire "makes it clear from the answers that [juror 6963 was] unwilling to temporarily set aside . . . [his] beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) To the contrary, in answering question 115 juror 6963 unequivocally stated the exact opposite. Given that it is the state's burden to demonstrate that the *Witt* standard has been met on the basis of the questionnaire alone, a de novo review of the record shows that the state did not carry this burden and the discharge was improper. (*See Witt*, 469 U.S. at p. 424 [burden is on the state to prove *Witt* standard met]; *People v. Stewart*, *supra*, 33 Cal.4th at p. 445 [same].)

2. Juror 6284.

Although juror 6284 was "opposed" to the death penalty, *in answer to question 115, he too specifically stated he could consider death as an option*. (17 CT Hardship 4556-4557.) The trial court excused juror 6284 over defense objection because "he is opposed to the death penalty, so that eliminates the possibilities. It's a Wainwright v.

Whit (sic) failure." (12 RT 2384.)

Ignoring juror 6284's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues that the trial court properly discharged this juror under *Witt* because the juror did not "believe in the death penalty" and said he was "oppose[d]" to the death penalty. (RB 183.) The state explains that this justified discharge here because it showed "he did not believe in the death penalty." (RB 183.)

Just as with juror 6963, the state's factual observation is correct but entirely irrelevant to the legal question. The fact that juror 6284 did not believe in the death penalty was *not* a permissible reason to discharge him. It is, after all, just another way of saying that he was discharged because he opposed the death penalty -- exactly what *Witt* prohibits. The limitation *Witt* imposes on the state's ability to discharge jurors is not based on whether or not the juror believes in the death penalty, it is whether the juror can set aside whatever beliefs he has and impose a death sentence.

Here too the state's *Witt* argument focuses on a fact that is irrelevant to the constitutional analysis. While the state correctly notes that juror 6284 did not believe in the death penalty, nothing in his questionnaire "makes it clear from the answers that [juror 6284 was] unwilling to temporarily set aside . . . [his] beliefs and follow the law."

(*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) To the contrary, and just as with juror 6963, in answering question 115 juror 6284 said exact opposite: that he was willing to consider death as an option. Because it was the state's burden to prove the *Witt* standard has been met, a de novo review of the record shows that this discharge was improper.

3. Juror 27605.

Although juror 27605 "strongly opposed" the death penalty, *in answer to question 115, he specifically stated he could consider death as an option*. (2 CT Hovey 89.) The trial court excused juror 27605 over defense objection because he was "opposed to the death penalty" and "in the Court's opinion would not qualify under Wainwright v. Witt." (16 RT 3179.)

Ignoring juror 27605's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues that the trial court properly discharged this juror under *Witt* because he "checked 'Strongly Oppose'" on his questionnaire, "and 'wrote that he was against it.'" (RB 184.) The state argues that these answers show juror 27605 "was substantially impaired under *Witt*." (RB 184.)

Suffice it to say here that the state's *Witt* argument as to juror 27605 cannot be

upheld without overruling *Witt* itself. Contrary to the state's argument, the fact that juror 27605 was strongly opposed to the death penalty, and wrote that he was "against it," was not a permissible reason to discharge him. It was the state's burden to prove that this juror was substantially impaired in his ability to consider death; given that he explicitly told the court he *could* consider death, the state did not carry its burden. If *Witt* is to mean anything at all, the state cannot satisfy it by simply reiterating that a juror is opposed to the death penalty.

The state adds that when asked in question 110 if it would be "difficult" to vote for death if it were a defendant's first offense, juror 27605 recognized it would, checking "yes." (RB 187.) The state makes this same observation in connection with jurors 29280, 6960, 7056, 8340 and 5909. (RB 187, 188, 190, 194.)

The legal relevance of this observation to the *Witt* inquiry is not immediately apparent. As this Court has noted time and again, even where a prospective juror goes further and admits he would find it "very difficult ever to impose death," that is an *insufficient* reason to discharge the juror absent evidence that the juror would be unwilling or unable to follow a trial court's instructions on the law. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447. *Accord People v. Merriman*, *supra*, 60 Cal.4th at p. 53; *People v. Riccardi*, *supra*, 54 Cal.4th at p. 779.)

And given the record in this case, the factual relevance of the state's observation is equally difficult to discern. Of the 18 jurors and alternates actually seated, 14 of them also recognized it might be difficult to impose death in this situation "depend[ing] on the evidence" and one of these 14 also checked "yes." (1 CT Main Juror Questionnaires ("CT MJQ") 20, 43, 66, 89, 112, 135, 158, 204, 227, 250, 296, 319, 342, 411.) In fact, only four of the 18 seated jurors and alternates checked "no" in answering this question. (*Id*. at 181, 273, 365, 388.) The trial court's actual treatment of these seated jurors shows that difficulty imposing death on a first time offender was not itself a disqualifying answer. A de novo review of the record shows that this discharge was improper.[7]

4. Juror 4841.

Although juror 4841 strongly opposed the death penalty, *in answer to question 115, she specifically stated she could consider death as an option*. (2 CT Hovey 226-227.) The trial court excused juror 4841 over defense objection because juror 4841 was "[s]trongly opposed" to the death penalty and so "would not qualify." (16 RT 3180.)

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[7] The trial court's treatment of other prospective jurors who also answered "yes" to question 110 confirms this. In fact, as indicated in Appendix A, there were at least 18 such jurors. Of these 18, every one was voir dired by the trial court and the parties. (Appendix A.) Given that the record unequivocally shows a "yes" answer to question 110 was certainly *not* viewed as a disqualifying answer in and of itself, the state's reliance on it here remains something of a mystery.

Ignoring juror 4841's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues that the trial court properly discharged this juror under *Witt* because there was no reason to think "that bringing her in for extensive questioning would make her eligible to serve as a juror in this case." (RB 186.) This argument also misses the mark.

The question is *not* whether further voir dire would be useful -- although in truth further voir dire probably would have been useful. The trial court's error here was in discharging the juror because of her death penalty views.

The state observes there was no equivocation in juror 4841's answers. (RB 186.) The state is correct. The juror unequivocally stated she was (1) opposed to the death penalty but (2) willing to consider death as an option. While further voir dire would certainly have been a permissible option, summarily discharging this juror because of her views on the death penalty was not. Simply put, nothing in the jury questionnaire "makes it clear from the answers that [juror 4841 was] unwilling to temporarily set aside . . . her beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) A de novo review of the record shows that this discharge was improper.

5. Juror 29280.

Although juror 29280 strongly opposed the death penalty, *in answer to question 115, he specifically stated that he could consider death as an option*. (5 CT Hovey 940.) The trial court excused juror 29280 over defense objection "because this juror is opposed to the death penalty, and fails Wainwright v. Witt." (17 RT 3486.)

Ignoring juror 29290's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues this juror was properly discharged under *Witt* because he believed the death penalty was ethically unjust, he had worked to abolish it and he believed that life in prison was preferred. (RB 187.) Given that juror 29280 explicitly said that he *would* consider death as an option in answering question 115, none of these factual observations "makes it clear from the answers that [juror 4841 was] unwilling to temporarily set aside . . [his] beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) Yet again, juror 29280's direct answer to question 115 that he *could* consider death as an option suggests the exact opposite: that he *was* willing to set aside whatever ethical concerns he had and do his duty as a juror. A de novo review of the record shows that this discharge was improper.

6. Juror 6960.

Although juror 6960 opposed the death penalty, *in answer to question 115, she specifically stated she could consider death as an option*. (8 CT Hovey 2043-2044.) The trial court excused juror 6980 over defense objection "because [she] is opposed to the death penalty, without reservation." (21 RT 4245.)

Ignoring juror 6960's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues this juror was properly discharged under *Witt* because in her questionnaire she stated that (1) she wished the death penalty "was not a thing needed" and (2) life without parole was "good in some cases." (RB 187.) However, because juror 6960 explicitly said that she *would* consider death as an option in answering question 115, none of these factual observations "makes it clear from the answers that [juror 6960 was] unwilling to temporarily set aside . . . her beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) Yet again, juror 6960's direct answer to question 115 suggests the exact opposite: that she *was* willing to set aside whatever ethical concerns she had and do her duty as a juror. A de novo review of the record shows that discharge of this juror was improper.

7. Juror 7056.

Although juror 7056 opposed the death penalty, *in answer to question 115, she specifically stated she could consider death as an option*. (10 CT Hovey 2572-2573.) The trial court excused juror 7056 over defense objection because she "oppose[d] the death penalty . . . so . . . would not pass Wainwright v. Witt." (23 RT 4469.)

Ignoring juror 7056's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues this juror was properly discharged under *Witt* because the juror "wrote 'I don't believe in the death penalty" and checked the box "oppose" when asked to rate her attitude towards the death penalty. (RB 188.) According to the state, her "questionnaire answers demonstrated an inability to conscientiously consider death as a sentencing alternative" and she showed no "ambivalence about her views on the death penalty." (RB 188.)

The state's arguments must be rejected. As discussed above, the state's focus on ambivalence about the death penalty is beside the point. Under *Witt*, the question is not whether a prospective juror's death penalty views are ambivalent, the question is whether the juror can set aside those views -- regardless of whether they are ambivalent -- and consider death as an option.

The state's related suggestion that juror 7056's "questionnaire answers demonstrated an inability to conscientiously consider death as a sentencing alternative" fares no better. In fact, the suggestion ignores entirely juror 7056's answer to question 115. Because juror 7056 explicitly said she *would* consider death as an option in answering question 115, the state simply cannot carry its burden of showing the questionnaire answers alone "make[] it clear . . . that [juror 7056 was] unwilling to temporarily set aside . . . her beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) A de novo review of the record shows that discharge of this juror was improper.

8. Juror 16727.

Although juror 16727 was strongly opposed to the death penalty, *in answer to question 115, he specifically stated he could consider death as an option*. (10 CT Hovey 2641-2642.) The trial court excused juror 16727 over defense objection because "he's opposed to the death penalty." (24 RT 4770.)

Ignoring juror 16727's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues this juror was properly discharged under *Witt* because he strongly opposed the death penalty and this view was based on his

"spirituality." (RB 189.) To the extent the state's argument rests on the fact that juror 16727 "strongly opposed" the death penalty, the state's argument simply ignores the relevant authority. The question is not whether (or even to what degree) a prospective juror opposes the death penalty. Instead, as noted above, the question under *Witt* is whether that juror can set aside his views and follow the law. And as to that question, juror 16727's answer to question 115 was unequivocal -- despite the spiritual origin of his opposition to the death penalty, he had no "moral, religious or philosophical opposition" which would make him "unable to impose the death penalty regardless of the facts." (10 CT 2642.)

It may be that the state's argument is based not on the fact that juror 16727 was strongly opposed to the death penalty, but that the *source* of juror 16727's opposition was spiritual. Yet the state cites no authority at all to support an argument that whether a prospective juror's opposition to the death penalty renders him unable to follow the law depends on the source of that opposition, be it moral, philosophical, practical or religious. No such authority exists. In short, nothing in his questionnaire "makes it clear from the answers that [juror 16727 was] unwilling to temporarily set aside . . . [his] beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) Indeed, as with the jurors discussed above, juror 16727's explicit answer to question 115 suggests the exact opposite. Accordingly, a de novo review of the record shows that discharge of this juror

was improper.

9. Juror 8340.

Although juror 8340 was opposed to the death penalty, *in answer to question 115, she specifically stated she could consider death as an option*. (10 CT Hovey 4043-4044.) The trial court excused juror 8340 over defense objection "because the juror's (sic) opposed to the death penalty on religious grounds." (28 RT 5485.)

Ignoring juror 8340's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues this juror was properly discharged under *Witt* because she felt "strongly against [the death penalty] due to religious beliefs." (RB 190.) But as discussed above, neither the strength nor the source of her beliefs answer the question here. The question is not whether prospective juror 8340 felt strongly against the death penalty, or whether her beliefs were based on religion, morality or philosophy; the question is whether her questionnaire "makes it clear from the answers that [juror 16727 was] unwilling to temporarily set aside . . . her beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) Here, nothing at all in her questionnaire "makes it clear" that juror 8340 would refuse to apply the law. Indeed, in light of juror 8340's explicit answer to question 115 stating that she *would* be able to

impose death, if anything her juror questionnaire "makes it clear" that she could follow the law. (15 CT 4044.) A de novo review of the record shows that discharge of this juror was improper.

10. Juror 23873.

Although juror 23873 was strongly opposed to the death penalty, *in answer to question 115, she specifically stated she could consider death as an option.* (21 CT Hovey 5585-5586.) The trial court excused juror 23873 over defense objection because "she strongly opposes the death penalty." (32 RT 6384-6385.)

Ignoring juror 23783's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues this juror was properly discharged under *Witt* because the juror "strongly oppose[d]" the death penalty, wrote that it was "not good" and felt life without parole was "ok." (RB 191.) According to the state, this evidence proves that juror 23873 could not set aside her views and consider death as an option.

It is, of course, impossible to square the state's current position with juror 23783's answer to question 115. In fact, reading the questionnaire as a whole, nothing in the questionnaire "makes it clear from the answers that [juror 23783 was] unwilling to

temporarily set aside . . . her beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) As with all the jurors discussed above, in light of juror 23783's explicit answer to question 115 stating that she *would* be able to impose death, if anything her juror questionnaire "makes it clear" that she could follow the law. A de novo review of the record shows that discharge of this juror was improper.

11. Juror 593.

Although juror 593 was strongly opposed to the death penalty *in answer to question 115, he specifically stated he could consider death as an option*. (4 CT Hovey 870-871.) The trial court excused juror 593 over defense objection because "[t]his juror is opposed to the death penalty." (17 RT 3486.)

Ignoring juror 593's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues this juror was properly discharged under *Witt* because he said he was strongly opposed to the death penalty in responding to two different questions in the jury questionnaire about his views, not just one. (RB 192.) According to the state, this "demonstrated substantial impairment . . . ." (RB 192.)

It does nothing of the sort. It shows that he was opposed to the death penalty. It

says nothing about whether he could set aside his views and consider death. The only information available in that area is juror 593's answer to question 115, where juror 593 said that he harbored no views at all which would make him unable to impose death. (4 CT 871.) Given that it is the state's burden to demonstrate that the *Witt* standard has been met, a de novo review of the record shows that the state did not carry this burden as to juror 593 and the discharge was improper.

12. Juror 23916.

Although juror 23916 opposed the death penalty, *in answer to question 115, she specifically stated she could consider death as an option.* (21 CT Hovey 5770-5771.) The trial court excused juror 23916 over defense objection. (34 RT 6672-6673.)

Ignoring juror 23916's direct answer to question 115, the state argues this juror was properly discharged because she "wrote 'I do not believe in the death penalty," and felt life without parole was "a better sentence." (RB 193.) The state argues that this evidence showed an "unequivocal bias against the death penalty . . . ." (RB 193.)

It does not. What it shows is that the trial court should have asked juror 23916 whether her death penalty views would prevent her from considering death as an option in

the case. And, in fact, when the court did just that in question 115, juror 23916 explained that she *could* in fact consider death as an option. (27 CT Hovey 7361.) On this record, nothing in the questionnaire "makes it clear from the answers that [juror 23916 was] unwilling to temporarily set aside . . . her beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) A de novo review of the record shows that discharge of this juror was improper.

13. Juror 5909.

Although juror 5909 strongly opposed the death penalty, *in answer to question 115, she specifically stated she could consider death as an option*. (27 CT Hovey 7360-7361.) The trial court excused juror 5909 over defense objection "because this juror opposes the death penalty, and is not qualifiable under Wainwright v. Witt." (38 RT 7862.)

Ignoring juror 5909's direct answer to question 115 and the trial court's stated reason for the discharge, the state argues this juror was properly discharged under *Witt* because she said she was "strongly opposed" to the death penalty, she said she was "against the death penalty" and she thought life without parole was "fine" as a punishment. (RB 194.) In the state's view, this meant that juror 5909 would "invariably

vote" against the death penalty. (RB 194.)

As with every juror discussed above, however, the state's entire position depends on ignoring question 115. Juror 5909 explicitly said that she had no moral, religious or philosophical views that would prevent her from following the law and considering death as an option. (27 CT 7361.) In light of this clear answer to question 115, nothing in her questionnaire "makes it clear . . . [juror 5909 was] unwilling to temporarily set aside . . . [his] beliefs and follow the law." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 647.) As with every one of the jurors discussed above, juror 5909's explicit answer to question 115 suggests the exact opposite. Accordingly, a de-novo review of the record shows that discharge of this juror was improper.

14. Summary.

In answering question 115, every one of the 13 jurors discussed above said that although they were opposed to the death penalty, they had no "moral, religious or philosophical opposition to the death penalty" which would prevent them from imposing a death sentence. The state simply ignores this answer in connection with every one of these jurors.

Nearly half a century ago, the Supreme Court concluded that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519. *Accord Uttecht v. Brown* (2007) 551 U.S. 1, 6; *People v. Whalen*, *supra*, 56 Cal.4th at p. 25.) Justice Powell's majority opinion in *Witherspoon* cautioned that in discharging jurors simply because they were opposed to the death penalty -- without finding out whether these jurors could follow the law and consider death as an option -- "the State [would] produce a jury uncommonly willing to condemn a man to die." (391 U.S. at p. 519.)

So it is here. The state assures this Court that the trial court's goal at trial was to ensure "a level playing field" and this "was nowhere more true than during the jury selection process." (AOB 167.) Mr. Peterson has no doubt that the state's appellate lawyers are sincere, and indeed that the trial court itself was trying to do its best.

But although the state now ignores the subject entirely, it bears emphasizing that there was nothing "level" about the playing field which resulted from the trial court's interpretation of *Witt*. The trial court's view of *Witt* was that "[u]nder Wainwright v. Witt if you are opposed to the death penalty, you are not qualified to serve as a trial juror in this kind of case." (16 RT 3356.) This view is unalterably and inescapably wrong. As

noted above, defense counsel's repeated protests were ignored, and the various prosecutors stood by silently and permitted the court to strike juror after juror based on this view. The results of such a skewed view of jury selection were predictable.

Of the 12 jurors seated on the "level playing field" the state now defends, 11 supported the death penalty and the twelfth was "ok with [the] death penalty [if] warranted." (1 CT MJQ 19, 42, 65, 88, 111, 134, 157, 180, 203, 226, 249, 272.) Of the six jurors seated as alternates on the state's "level playing field," all six supported the death penalty. (1 CT MJQ 295, 318, 341, 364, 387, 410.)

At the end of the day, while the parties may disagree about much, they should not disagree that this result bears little resemblance to the laudable goal of a "level playing field." To the contrary, the result here is exactly what Justice Powell had in mind when he described a "jury uncommonly willing to condemn a man to die." It was anything but a "level playing field." A new penalty phase is required.

## C. The Trial Court's Improper *Witt* Discharges Of Seven Of These Thirteen Jurors May Not Be Upheld By Speculating That The Trial Court Could Have Discharged Them For Other, Unstated Reasons.

### 1. Introduction.

As to 7 of the 13 jurors discharged by the trial court based on *Witt*, the state makes a second argument. The state argues that there was no error because the trial court could have relied on *other* answers in the jury questionnaire to discharge these 7 jurors for different reasons. (RB 180-182 [Juror 6963]; 182-184 [Juror 6284]; 184-185 [Juror 27605]; 188-189 [Juror 7056]; 191-192 [Juror 23873]; 192 [Juror 593]; 193-194 [Juror 23916].) The state does not argue that the trial court *actually* relied on any of these other reasons, just that it *could* have.

Since the state concedes that under existing law the improper discharge of even a single juror under *Witt* requires reversal (RB 195), there may be no need to address this separate issue. Because the state makes this alternate argument only as to 7 of the 13 jurors, if the court finds that any of the 6 remaining jurors (jurors 4841, 29280, 6960, 16727, 8340 and 5909) were improperly discharged under *Witt*, a new penalty phase is required. But putting this aside, the state's alternate argument as to these 7 jurors is meritless.

Generally, of course, "[i]t is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory." (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1317.)

But there is an exception to this general rule. Notwithstanding the adverse view of new legal theories on appeal, a trial court's ruling may be defended on a different legal ground so long as the new theory does not involve conflicting factual questions that were not resolved at trial precisely because the new theory was not relied upon below. (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 39; *Cramer v. Morrison* (1979) 88 Cal.App.3d 873, 887.) "Although an appellate court may affirm an order upon a theory of law other than that adopted by the trial court, it is not appropriate to do so by exercising a discretion and making factual decisions to which the trial court has never addressed itself." (*Rutan v. Summit Sports, Inc*. (1985) 173 Cal.App.3d 965, 974. *Accord Jonson v. Weinstein* (1967) 249 Cal.App.2d 954, 960.) Thus, when a trial court has stated reasons for a discretionary decision, and those reasons are improper, a reviewing court may not step into the shoes of the trial court and uphold the decision by making its own discretionary decision in the first instance:

> "It would be incongruous for an appellate court, reviewing such order, to rely on reasons not cited by the trial court. Otherwise, we might uphold a

> discretionary order on grounds never considered by, or, worse yet, rejected by the trial court." (*People v. Bonnetta* (2009) 46 Cal.4th 143, 151.)

Here, the state offers alternate grounds to defend 7 of the 13 discharges, relying on answers to various other questions in the questionnaires. In light of the authority discussed above, the question is whether these newly minted grounds involve conflicting factual questions which were not resolved below. It is to that question Mr. Peterson now turns.

2. The alternative grounds on which the state now seeks to defend seven of the trial court's thirteen *Witt* discharges involve factual disputes never resolved at trial precisely because the state never raised these grounds.

The alternative jury questionnaire answers on which the state now relies do not come close to establishing that as a matter of law, these 7 jurors were unfit to serve. At most, they establish there were factual areas where the trial court might have questioned certain jurors to learn more. Precisely because the trial prosecutors remained silent at trial -- and the state did not propose these new theories until 10 years after jury selection -- the trial record is completely inadequate to determine whether discharge was proper based on these alternate grounds.

For example, as to discharged juror 7056, the state now argues that even if the trial court improperly discharged her under *Witt* no error occurred. (RB 189.) The state's thesis is that the trial court could have discharged juror 7056 based solely on her answer to question 88. (RB 189.) Because the state's thesis depends on a factual inquiry which was never made, it must be rejected.

Questions 88 and 89 formed a two-question section of the questionnaire about circumstantial evidence. Question 88 asked jurors if they had any views which would prevent them from relying on circumstantial evidence, while question 89 asked jurors if they could follow the trial court's instruction that both direct and circumstantial evidence "are entitled to the same weight." (*See* 1 CT MJQ 39.) Jurors 7056 answered "yes" to both questions. (10 CT Hovey 2569.)

The state may be right that if a juror ultimately made clear he or she would simply refuse to consider circumstantial evidence, discharge of the juror would be proper. But the record does not come close to showing that juror 7056 would not consider circumstantial evidence. Although juror 7056 answered question 88 in the affirmative -- saying that her views about circumstantial evidence would prevent her from considering such evidence -- she immediately answered question 89 in the affirmative as well, saying that she *would* follow an instruction telling her to treat direct and circumstantial evidence

the same and accord them both the same weight. (10 CT Hovey 2569.)

Mr. Peterson concedes that these two answers are in tension, and could raise a legitimate factual question as to juror 7056. There are, of course, a number of possibilities. Juror 7056 could simply have misunderstood question 88. Or she could indeed have had adverse views of circumstantial evidence, but be willing to set them aside as indicated in question 89. Or she could have had strong views as to circumstantial evidence, and have answered question 89 incorrectly.

Of course, juror 7056's ultimate position on circumstantial evidence was a factual question that could have been resolved through voir dire. *Indeed, the record shows this is exactly what happened with respect to other jurors who gave the same combination of answers to questions 88 and 89.*

For example, just like prospective juror 7056, prospective juror 4741 answered "yes" to questions 88 and 89. (1 CT MJQ 85.) The trial court and prosecutor recognized the potential factual conflict created by these two answers and followed up with specific voir dire questions to resolve whether juror 4741 could, in fact, consider circumstantial evidence. (17 RT 3418-3419, 3425.) Learning that juror 4741 could indeed consider

circumstantial evidence, he was seated as a juror. (1 CT MJQ 70.)[8]

But as to juror 7056, the court never resolved this same factual conflict. Because the court discharged her based on *Witt*, there was no voir dire. Because there was no voir dire, the court did not resolve whether this juror harbored disabling views about circumstantial evidence or, as her answer to question 89 suggests, she was perfectly capable of treating such evidence the same as direct evidence. So the record simply does not resolve whether 7056 was (1) impaired because she could not consider circumstantial evidence or (2) unimpaired, just like seated jurors 4741 and 8510. Because Mr. Peterson was deprived of an opportunity to litigate the factual premises for this issue, it may not be relied on for the first time on appeal.

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[8] Other prospective jurors who answered questions 88 and 89 "yes" were also seated. (1 CT MJQ 24, 39 [juror 8510].) Moreover there were at least 11 other prospective jurors called to *Hovey* voir dire who also answered both questions 88 and 89 "yes." (5 CT Hovey 982 [juror 695]; 5 CT Hovey 1120 [juror 29361]; 8 CT Hovey 1971 [juror 4379]; 11 CT Hovey 2776 [juror 17983]; 11 CT Hovey 2822 [juror 16761]; 12 CT Hovey 3213 [juror 16811]; 13 CT Hovey 3351 [juror 5827] 14 Ct Hovey 3765 [juror 8384]; 15 CT Hovey 3879 [juror 8457]; 17 CT 4431 [juror 258]; 17 CT Hovey 4684 [juror 29606].) *None* of these jurors were simply discharged because of these answers. Instead every single one of them was voir dired by the court and the parties. (18 RT 3663-3687 [juror 695]; 18 RT 3663 [juror 29361]; 21 RT 4264-4272 [juror 4379]; 25 RT 4949-4984 [juror 17983]; 25 RT 4888-4890 [juror 16761]; 27 RT 5208-5210 [juror 16811]; 28 RT 5326-5334 [juror 5827]; 29 RT 5581-5583 [juror 8384]; 29 RT 5579-5580 [juror 8457]; 29 RT 5793-5794 [juror 258]; 30 RT 6081-6085 [juror 29606].) Plainly this combination of answers to questions 88 and 89 was not by itself disqualifying.

This is not the only factual conflict on which the state now seeks to rely in connection with its new theories. As to prospective juror 593, the state argues that even if the trial court improperly discharged him under *Witt* no error occurred because the court could have discharged him for checking "not much" when asked his confidence level in circumstantial evidence. (RB 192-193 citing 4 CT Hovey 866.) According to the state, this answer alone was sufficient reason to find that juror 593 could not follow the law. (RB 193.)

The state is again asking this Court to speculate and resolve a factual question. Juror 593 answered questions 88 and 89 and agreed he *could* consider circumstantial evidence and would follow any instructions to treat it the same as direct evidence. (4 CT Hovey 867.) In context, then juror 593's separate statement that his confidence level in circumstantial evidence was "not much" is simply insufficient to show that he was substantially impaired and therefore unfit to serve as a juror. At most, this combination of answers create an open factual question which the trial court would have been within its discretion to resolve through voir dire.

Once again, on the current record there should be no dispute on this. *In fact, the record shows this is exactly what happened with respect to other jurors who expressed the same "not much" confidence level with respect to circumstantial evidence*.

For example, just like juror 593, prospective juror 6869 also agreed she would follow any instructions on circumstantial evidence even though she had "not much" confidence in circumstantial evidence. (1 CT MJQ 153-154.) Because these answers raised a factual question about whether the prospective juror would fairly credit circumstantial evidence, the prosecutor questioned her about her views on circumstantial evidence. (37 RT 7514-7517.) The questioning resolved the factual conflict and juror 6869 was selected for the jury. (1 CT MJQ 139.)[9]

But just like juror 7056, the trial court never resolved this conflict as to juror 593. Because the court discharged him based on *Witt*, there was no voir dire. Because there was no voir dire, the court did not resolve whether this juror harbored disabling views about circumstantial evidence or, as his answer to question 89 suggests, he was perfectly capable of treating such evidence the same as direct evidence. So the record simply does

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[9] Other prospective jurors who initially expressed "not much" confidence in circumstantial evidence were also selected for the jury. (1 CT MJQ 107 [juror 20840]; 268 [juror 17901].) Moreover, there were at least six other jurors called to *Hovey* voir dire who -- just like juror 593 -- expressed "not much" confidence in circumstantial evidence generally but agreed to consider it in accord with the trial court's instructions. (2 CT Hovey 130 [juror 4486]; 2 CT Hovey 153 [juror 4692]; 3 CT Hovey 545 [juror 4899]; 8 CT Hovey 1924 [juror 29445]; 17 CT Hovey 4614 [juror 8542]; 19 CT Hovey 5144 [juror 9849].) *None* of these jurors were simply discharged because of this answer. Instead, every single one of them was voir dired by the court and parties. (16 RT 3141-3143 [juror 4486]; 16 RT 3143-3147 [juror 4692]; 16 RT 3359-3361 [juror 4889]; 20 RT 4072-4074 [juror 29445]; 30 RT 6030-6037 [juror 8542] 31 RT 6217-6237 [juror 9849].) Plainly this answer on the juror questionnaire was not itself disqualifying.

not resolve whether juror 593 was (1) impaired because he could not consider circumstantial evidence or (2) unimpaired, just like seated juror 6869.

There is no need to go into each and every one of the myriad of new reasons on which the state now seeks to rely as to these seven jurors. The analysis as to each reason is the same. At most, each of these newly identified answers would have justified the trial court or the parties in asking questions during voir dire to resolve potential factual conflicts to see if, in fact, the juror could not serve. (*See* RB 182 [urging reliance on alternate ground of hardship merely because juror stated he had a "chance of employment" on March 10 but trial court never resolved whether he got the job]; 183-184 [urging reliance on alternate ground that juror forgot to answer two pages on the jury questionnaire but trial court never resolved whether this was simply an oversight]; 191-192 [urging reliance on alternate ground that juror had unfavorable view of the criminal justice system merely because of how a family member was treated, but trial court never explored the issue as it did with seated jurors 4741 or 9533, *see* 1 CT MJQ 82, 220].)

In the final analysis, the state's attempt to salvage 7 of the 13 *Witt* discharges by reference to jury questionnaire answers which the trial court never relied on and the parties never discussed, is imaginative but without merit. The answers on which the state now relies do not come close to establishing that these 7 jurors were substantially

impaired and unfit to serve. At most, these answers raise factual questions which the trial court failed to resolve. Because the state's silence at trial prevented defendant from being able to fairly litigate these alternate grounds, they may not be relied on now to defend the trial court's ruling.

In aid of its contrary argument the state relies on *People v. Ghent* (1987) 43 Cal.3d 739. But *Ghent* does not aid the state's case at all; in that case, the discharges of two jurors were upheld on alternate grounds *that the parties had fully covered in voir dire*.

There, defendant was convicted of capital murder. During voir dire, the trial court questioned (and permitted both counsel to question) a number of prospective jurors, including Mrhre, Chasuk and Villalobos. On appeal, defendant contended that these three prospective jurors (among others) were improperly discharged under *Witherspoon v. Illinois*, *supra*. (43 Cal.3d at p. 767.) This Court rejected the challenge as to each of these jurors.

As to Mrhre, the Court noted that he was not actually discharged based on *Witherspoon* at all, but "was excused on the proper alternative ground of hardship." (43 Cal.3d at p. 768.) The Court upheld this discharge. (*Ibid.*) And as to prospective jurors Chasuk and Villalobos the Court ruled that "the responses of two other challenged

veniremen (Chasuk and Villalobos) indicated substantial doubt regarding their ability to render an impartial decision of the special circumstances issue, a proper ground for their exclusion wholly apart from their feelings regarding the penalty." (*Ibid*.)

Nothing in *Ghent* even remotely overrules the longstanding rule precluding reliance on new theories on appeal which depend on conflicting factual questions never resolved at trial. In fact, the Court's ruling as to prospective juror Mrhre did not even involve a new theory on appeal; he was, in fact, discharged based on hardship, a ground he was specifically questioned about at trial *and which was the identical ground which this Court relied on in upholding the discharge on appeal*.[10]

The Court's rulings in connection with both Chasuk and Villalobos are at least closer to the mark, since they involved upholding the discharged on appeal based on a theory that was different from the theory on which the trial court relied. But although *Ghent* upheld the discharges based on alternative grounds, these grounds were ones both jurors had been questioned about during voir dire, so there was neither unfairness nor

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[10] In reaching this conclusion, the Court was simply adopting the position of the Attorney General who quoted the questioning of Mrhre in full, noted that the trial court's stated reason for discharging this juror was because he "is a carpenter and dependent upon his wage" and concluded that "[c]learly, venireperson Mrhre was excluded for hardship and appellant has attempted to mislead the Court." (*People v. Ghent*, No. 21311, Respondent's Brief at p. 30.)

lingering factual conflicts.

But that is certainly not what the state is arguing for here. Here, the state is urging the Court to rely on alternate grounds which were *never* discussed at trial, and which *neither* party was permitted to inquire about on voir dire. *Ghent* does not authorize such a radical departure from existing practice. The state's attempt to defend 7 of the 13 discharges on such grounds should be rejected.

## II. THE TRIAL COURT'S IMPROPER DISCHARGE OF THIRTEEN PROSPECTIVE JURORS BASED SOLELY ON OPPOSITION TO THE DEATH PENALTY ALSO REQUIRES REVERSAL OF THE CONVICTIONS.

As discussed above, in his opening brief Mr. Peterson contended that the trial court's improper discharge of 13 prospective jurors simply because they were opposed to the death penalty required a new penalty phase. (AOB 72-107.) In addition, he separately contended that under the Eighth Amendment, the erroneous discharge of these 13 prospective jurors also required a new guilt phase. (AOB 108-116.) He acknowledged adverse precedents from the United States Supreme Court and this Court holding that when such errors occur, a new penalty phase is required but not a new guilt phase. (AOB 108-110.)

Mr. Peterson explained why these precedents did not apply here. In fact, this adverse case law stemmed from the 1968 decision in *Witherspoon v. Illinois* (1968) 391 U.S. 510 which did *not* involve the Eighth Amendment at all, but the Sixth Amendment. (AOB 110-111.) As he explained, the Eighth Amendment jurisprudence on which Mr. Peterson was relying for his guilt phase argument actually began four years *after* the *Witherspoon* decision with *Furman v. Georgia* (1972) 408 U.S. 238. (AOB 111-112.) In short, neither this Court nor the United States Supreme Court have ever been faced with or resolved the specific Eighth Amendment question presented here. (AOB 112-113.)

The Eighth Amendment analysis is relatively simple and depends on three basic points. First, the Eighth Amendment requires procedures designed to ensure a reliable guilt phase verdict. (AOB 113-114 *citing Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama* (1980) 447 U.S. 625, 638, n.13.) Second, effective group deliberation is central to ensuring reliability in the jury system. (AOB 114 *citing Ballew v. Georgia* (1978) 435 U.S. 223, 232, 239.) Third, a process which excludes jurors eligible to serve, but who are less predisposed to convict, removes a distinct voice from the deliberative process and renders a resulting conviction less reliable. (AOB 114-116.)

Although the state does not dispute any of these three points, it nevertheless argues that reversal of the guilt phase is not required. According to the state, "appellant's argument is predicated on the oft-repeated assertion that death-qualification of jurors results in jury that is more prone to convict." (RB 197.)

In fact, however, the claim made here has nothing to do with proper death qualification of jurors. As Mr. Peterson specifically explained in his opening brief, *proper* death-qualification -- that is, discharging jurors who are against the death penalty and refuse to set aside their views and consider death as an option -- has long been accepted. (AOB 115.) This is so for two reasons. First, courts are also "life qualifying" jurors under *Morgan v. Illinois* (1992) 504 U.S. 719 -- that is, discharging jurors who are

in favor of the death penalty and refuse to set aside their views and consider life as an option. So the jury is at least balanced. And second, there is a strong systemic interest in having a unitary jury hear both the guilt and penalty phase of trial. (AOB 115-116.)

Thus, it is entirely beside the point that -- as the state accurately notes -- "this Court has repeatedly rejected the claim that death qualification of a jury" violates the constitution. (RB 198.) The claim here is *not* that proper death qualification violates the constitution; to the contrary, the claim here has nothing at all to do with proper death-qualification of a jury. The claim here involves an extreme case of *improper* death qualification -- where 13 jurors were improperly struck from the venire. In this situation, there is no balance at all -- after all, the trial court was not also performing improper life qualification under *Morgan*.

The state correctly notes that in several cases, this Court has held that improper exclusion of jurors under *Witt* does not require reversal of the defendant's guilt phase. (RB 199, *citing People v. Riccardi*, *supra*, 54 Cal.4th at p. 783; *People v. Stewart*, *supra*, 33 Cal.4th at p. 455; *People v. Heard*, *supra*, 31 Cal.4th at p. 958-959.) As Mr. Peterson recognized in his opening brief, this is entirely true. (AOB 108-109.) But as Mr. Peterson also explained in his opening brief, the source of the rulings in these cases was the Sixth Amendment, not the Eighth Amendment. (AOB 108-112.)

The state has three responses. First, the state suggests that in fact this Court *has* addressed the Eighth Amendment implications of improperly discharging jurors under *Witt* in connection with the guilt phase. (RB 199-200, citing *People v. Johnson* (1992) 3 Cal.4th 1183 and *People v. Taylor* (2010) 48 Cal.4th 574. (RB 200.)

The state is wrong. The Eighth Amendment guilt phase claims rejected in these cases involved *proper* death qualification. (*See Johnson*, *supra*, 3 Cal.4th at p. 1213 [rejecting claim that proper death qualification violates the Eighth Amendment]; *Taylor*, *supra*, 48 Cal.4th at pp. 603-604 [same].) Mr. Peterson will emphasize his position here. Although *proper* death qualification does not violate the Eighth Amendment in connection with the guilt phase, neither this Court nor the United States Supreme Court have decided whether *improper* discharge of a substantial number of jurors violates the Eighth Amendment in connection with the guilt phase. That is the claim made here.

Alternatively the state argues in a single sentence that Mr. Peterson "provide[d] no rationale for why" the result under the Eighth Amendment should be different from the result under the Sixth Amendment. (RB 200-201.) This passing suggestion is puzzling. In his opening brief Mr. Peterson spent six pages explaining precisely why a different result was compelled under the Eighth Amendment. (AOB 111-116.) In making its fleeting suggestion to the contrary, the state has simply overlooked Mr. Peterson's

argument. As such, of course, there is nothing to which Mr. Peterson can now respond.

Finally, the state accurately notes that Mr. Peterson's position -- based on social science research -- is that prospective jurors who oppose the death penalty (but are nevertheless willing to set aside their beliefs, follow the law and impose death) are less predisposed to convict. (RB 201.) Although more than 1000 prospective jurors filled out jury questionnaires here, the state focuses on 30 prospective juror whose voir dire the state alleges shows opposition to the death penalty but a belief in guilt. (RB 201.) The state argues that this fragmentary data "undermine[s]" the defense theory and shows that death penalty opponents were just as likely to believe Mr. Peterson guilty as death penalty supporters. (RB 201.) If this premise was true, of course, then exclusion of death penalty opponents would not have removed jurors who were less likely to convict.

But the premise is *not* true. And it is not even very close. The state's focus on 30 jurors it has selectively culled from more than a thousand called to service distorts what the record really shows. In fact, there were 373 jurors called for *Hovey* voir dire. (*See* 1 CT Hovey 1-15.) Although not every one of these prospective jurors answered each question on the jury questionnaire, before hearing a single witness -- when the presumption of innocence should have applied -- the unedited data shows a stark difference in the predisposition of jurors to convict based on their death penalty views:

PREDISPOSITION IN GUILT PHASE

| Death Penalty Views | Believed Defendant Guilty | Believed Insufficient Evidence Of Guilt | Total |
|---|---|---|---|
| Strongly Support | 29 (67%) | 14 (33%) | 43 (100%) |
| Strongly Oppose | 20 (38%) | 32 (62%) | 52 (100%)[11] |

In other words, and contrary to the state's thesis, looking at the jury venire as a

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[11] The record citations for these 95 prospective juror showing their death penalty views (question 109), along with their views as to whether Mr. Peterson was guilty (question 95), are attached to this brief as Appendix B. The easiest test to use in assessing the statistical significance of this data is a simple chi square test. Chi square is a test to determine the probability that results which vary from an outcome predicted by a particular thesis could happen at random. (*See NAACP v. Mansfield* (6th Cir. 1989) 866 F.2d 162, 167-168

The state's thesis here is that improperly excluding death penalty opponents is not significant because such jurors believed Mr. Peterson guilty at the same rate as death penalty supporters. The data summarized in the above chart shows that 67% of death penalty *supporters* believed Mr. Peterson was guilty while only 38% of death penalty *opponents* harbored that same view. If the state's thesis were correct, these percentages should have been the same.

Of course, in any random sample there is a natural variability; even with a valid thesis the observed data will not always match up exactly with the predicted data. For example, one can predict that flipping a coin 100 times should result in 50 heads and 50 tails. If the observed results vary -- say 45 heads and 55 tails -- this does not necessarily mean the thesis is wrong. When observed values differ from values predicted by a particular thesis, chi square measures the likelihood that the differences simply reflect the variability of the sample, rather than a flaw in the thesis. Here, running a chi square analysis on the data shows that if death penalty opponents and supporters believed Mr. Peterson guilty at the same rate as one another, the probability of randomly obtaining only 38% of death penalty opponents believing Mr. Peterson was guilty is .0001 or 1 in 10,000. From a statistical perspective this suggests quite strongly that the state's thesis is false.

whole, the data directly supports the social science research on which Mr. Peterson relied. 67% of those *Hovey* jurors who strongly *supported* the death penalty thought Mr. Peterson guilty without hearing a single witness. In contrast, only 38% of *Hovey* jurors who strongly *opposed* the death penalty believed he was guilty. These differences are stark and, as explained above, statistically significant.

An analysis of jurors discharged during the hardship process confirms the *Hovey* data. There were 136 prospective jurors involved in the hardship process who said they "strongly supported" the death penalty. Of this group, 76% thought Mr. Peterson guilty without hearing a single witness. In contrast, there were 188 prospective jurors during the hardship process who said they were "strongly opposed" to the death penalty. Of this

group, only 58% believed Mr. Peterson was guilty.[12]

The data is clear. Improperly discharging jurors simply because they are opposed to the death penalty removes from the jury pool a voice central to ensuring a reliable result. The state's thesis that the voir dire data "undermine[s] the social science studies upon which appellant relies" is made not by *relying* on the data in this case, but by *ignoring* it almost completely.

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[12] There were 1,260 juror questionnaires contained in Volumes 1-88 of the Clerk's Transcript -- the hardship discharges. (*See* 1 CT Hardship at pp. A-WW.) Again, although not every one of these prospective jurors answered each question, the unedited data shows the same substantial differences in the predisposition rates based on strongly held death penalty views:

PREDISPOSITION IN GUILT PHASE
(Hardship Questionnaires)

| Death Penalty Views | Believed Mr. Peterson Guilty | Believed Insufficient Evidence Of Guilt | Total |
|---|---|---|---|
| Strongly Support | 104 (76%) | 32 (24%) | 136 (100%) |
| Strongly Oppose | 110 (58%) | 78 (42%) | 188 (100%) |

The record citations of the 324 prospective jurors showing their death penalty views (question 109), along with their views as to whether Mr. Peterson was guilty (question 95), are attached to this brief as Appendix C. The chi square analysis of this data shows that if the state's theory that death penalty supporters and opponents believed Mr. Peterson guilty at the same rate was accurate, the probability of randomly obtaining only 24% of death penalty supporters believing there was insufficient evidence of guilt is also 1 in 10,000. Yet again, from a statistical perspective this suggests quite strongly that the state's thesis is false.

In sum, existing case law rejects the claim that improper death qualification requires a new guilt phase, but that case law rests on Sixth Amendment precedents. (AOB 108-111.) These precedents did not involve a claim based on the Eighth Amendment. (AOB 111-112.) And for the reasons explained in detail in the opening brief -- and which the state does not address -- improperly removing substantial numbers of eligible jurors simply because they are opposed to the death penalty removes an important view from the deliberative process and undercuts the reliability of the ensuing result. (AOB 114-116.) Reversal of the convictions is therefore required.

## ERRORS RELATING TO THE GUILT PHASE

### III. THE TRIAL COURT VIOLATED STATE AND FEDERAL LAW IN DENYING MR. PETERSON'S MOTION TO CHANGE VENUE AND FORCING HIM TO TRIAL IN A COUNTY WHERE NEARLY HALF OF ALL PROSPECTIVE JURORS HAD ALREADY CONCLUDED HE WAS GUILTY OF CAPITAL MURDER.

#### A. Introduction.

As the trial judge, the prosecutor and defense counsel all recognized, the publicity which surrounded this case was unlike any other case. A mob appeared at the jail the night Mr. Peterson was arrested. (9 CT 3341.) After venue was changed once, radio stations posted large billboards near the courthouse asking if Mr. Peterson was "man or monster." (14 CT 4491, n.3 and 4509; 36 RT 7081-7082.) There were hundreds of articles in local newspapers, many which discussed evidence that would be ruled inadmissible at trial. (AOB 164-168.) In addition, cable talk shows and news broadcasts covered the case on a daily basis.

Jury voir dire began on March 4, 2004. (11 RT 2025.) After nearly 1000 jurors completed their questionnaires, the results were stark, showing that 96% of potential jurors had been exposed to the publicity about the case and -- of this group -- 46%

admitted they had prejudged Mr. Peterson's guilt. (14 CT 4516, 4520.) Of the 46% of prospective jurors who admitted they had prejudged the case, a remarkable 98.6% had concluded Mr. Peterson was guilty of capital murder. (14 CT 4516.) Of this group, more than half reported that they would not set aside their views and judge the case based on the facts of trial. (AOB 175; AOB Appendix A.) All 12 seated jurors, as well as the six alternates, admitted that they too had been exposed to this same publicity. (CT MJQ 16-17, 39-40, 62-63, 85-86, 108-109, 131-132, 154-155, 177-178, 200-201, 223-224, 246-247, 269-270, 292-293, 315-316, 338-339, 361-362, 384-385, 407-408.)

Defense counsel moved to change venue, asking the court to move the case to Los Angeles County. The evidence before the trial court showed that Los Angeles had (1) the lowest prejudgment rate of any county in the state, (2) the lowest rate of people who thought Mr. Peterson was guilty and refused to set aside their views and (3) the highest rate of people who were willing to set aside any prejudgement they did have. (14 CT 4487-4716; *see* 10 CT 3643, 3646, 3649; 36 RT 7083-7084.) Nevertheless the trial court refused to change venue and denied the motion. (36 RT 7097-7099.)

In his opening brief, Mr. Peterson contended that the trial court's refusal to grant this change of venue motion violated both state and federal law and required reversal for two reasons. First, reversal was required without a showing of prejudice because the San

Mateo community had been saturated with prejudicial pretrial publicity. (AOB 156-170.)

The legal predicate for this argument is simple. In a series of cases, the United States Supreme Court has made clear than where prejudicial pretrial publicity has saturated a community, reversal is required without a showing of prejudice. (AOB 155.) The factual predicate for this argument is equally simple: here, the extraordinary pretrial publicity did indeed saturate the community and was of such a nature to trigger a presumption of prejudice. (AOB 156-170.) Mr. Peterson explicitly examined (1) the extent of the publicity in this case (AOB 163-165), (2) the content of that coverage, including articles (a) about jury selection, (b) covering defense attempts to suppress evidence, (c) attacking Mr. Peterson and his lawyer, (d) containing detailed discussions of the state's evidence, (e) repeating conclusions of guilt made by the Attorney General and (f) revealing evidence that would ultimately be ruled inadmissible at trial or that simply did not exist, (AOB 166-168) and (3) the non-print media. (AOB 168-169). Rather than speculate about the impact of this publicity on prospective jurors, Mr. Peterson specifically discussed the stark results from voir dire of the actual jury venire. (AOB 169-170.)

Alternatively, Mr. Peterson contended that even if a showing of prejudice had to be made, reversal was still required because actual prejudice had been shown. More than

96% of the jury venire admitted being exposed to the pretrial publicity, including every member of the jury eventually selected. Before a single witness was even called, fully 45% of the venire confessed that they had already concluded Mr. Peterson was guilty of capital murder. Of those more than half were so convinced by the pretrial publicity that they refused to set aside their views. In short, a fair trial was simply not possible in San Mateo county. (AOB 170-176.)

The state disagrees with both contentions. The state concedes that the Supreme Court has indeed presumed prejudice in numerous cases. (RB 243.) According to the state, however, this is not such a case because the media was not permitted to turn the trial itself into a "carnival atmosphere." (RB 244.) Without a word about the extent of the news coverage, the substance of that coverage, the references to inadmissible evidence in the press coverage, the references to non-existent evidence in that coverage, the percentage of the venire who had been exposed to that coverage, or the percentage of the venire admitting they believed Mr. Peterson guilty without hearing a single witness, the state argues that "all that appellant can muster in support of his argument for a finding of presumptive prejudice are photos of two billboards." (RB 244.) Based on this factual premise -- that all Mr. Peterson "can muster in support of his argument for a finding of presumptive prejudice are photos of two billboards" -- the state argues that this is not an extreme case which requires a presumption of prejudice. (RB 245-246.)

The state separately argues that actual prejudice has not been shown. (RB 246-269.) Ignoring entirely the results of the *actual* voir dire process, the state relies on (1) a five factor test courts have articulated in the pre-trial context for *prospectively* assessing whether a defendant is likely to receive a fair trial, (2) a pre-trial survey by an expert hired by the prosecution and (3) the voir dire of the 12 jurors selected to try the case, all of whom -- in one way another -- assured the court they would be fair. (RB 246-269.) In addition, the state notes that because defense counsel did not use all his peremptory challenges, this "demonstrated satisfaction with the jury as selected." (RB 270-271.)

Mr. Peterson will address each of the state's arguments. They are without merit and reversal is required.

### B. Because San Mateo County Was Saturated With Prejudicial Publicity, Prejudice Is Presumed And A New Trial Is Required.

The parties agree on the broad legal principles governing this claim. The state notes that pretrial publicity "does not invariably lead to an unfair trial" and that juror impartiality does not require ignorance. (RB 245.) Mr. Peterson agrees with both propositions. To its credit, however, the state recognizes that in certain situations -- what it calls "extreme cases" -- the Supreme Court *has* held that pretrial publicity may require a presumption of prejudice. (RB 243-245.) Again, Mr. Peterson agrees.

The question to be resolved, then, is whether this is one such "extreme case." That analysis, of course, will depend on the facts of the case. And it is here that the parties disagree.

Curiously the state devotes very little of its argument on the presumed prejudice issue to *any* of the facts in this case. (RB 242-246.) Instead, as noted above, the state simply argues that this is not an extreme case because "all that appellant can muster in support of his argument for a finding of presumptive prejudice are photos of two billboards." (RB 244.)

As to this assertion, the parties are again in agreement. If all this case involved was the installation of two billboards, Mr. Peterson agrees it would not be an extreme case at all. But as the detailed discussion in Mr. Peterson's opening brief shows, the billboards were merely a part -- a very visible part -- of the publicity onslaught.

401 journalists arrived to cover the story in San Mateo -- the San Mateo Times noted it was the "biggest media circus in San Mateo County history." (14 CT 4557.) In the approximately 90 days period between the first court hearing in San Mateo and defense counsel's May 3 change of venue motion, there were 95 articles in the two local papers alone -- the San Mateo Times and the Redwood City News. (14 CT 4535-4557,

4560-4686.) Mr. Peterson discussed the extent and substance of these articles in detail in his opening brief. (AOB 163-170.)

This Court's review of the publicity is, of course, de novo. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1321; *People v. Williams* (1989) 48 Cal.3d 1112, 1112.) A de novo review of the pre-trial publicity shows that the articles discussed attempts by the defense to suppress evidence. (14 CT 4545, 4547, 4548, 4554, 4556, 4647, 4652, 4653, 4684, 4686.) They described Laci as "beautiful, pregnant Laci Peterson" and as a "vivacious brunette with the brilliant smile." (14 CT 4556.) They described Mr. Peterson as laughing and joking during legal proceedings and trying to make book and movie deals over the objections of Laci's mother. (14 CT 4544, 4548, 4670.) They said trial counsel thought Mr. Peterson was guilty. (14 CT 4541.) They referred to extra-marital affairs of Mr. Peterson. (14 CT 4670.)

The articles also covered in detail the facts of the state's case. (14 CT 4548, 4646, 4649.) They provided the prospective juror members with detailed descriptions of evidence which had been (or would be) ruled inadmissible at trial. (14 CT 4646-4647, 4654, 4664, 4666, 4667, 4673-4682.) They provided equally detailed descriptions of evidence against defendant which simply did not exist. (14 CT 4667.) There were even editorials telling the readership -- in effect -- that trial was unnecessary because defendant

was guilty. (14 CT 4556-4557.) And this was just the *local* print media alone -- the regional and national print media (such as the San Francisco Chronicle) also covered the case routinely. Network television, cable and radio simply added to the chaos. (*See* 15 CT 4722.) Indeed, it was radio stations that were responsible for the billboards which the state suggests were the only basis for a finding or presumed prejudice.

The trial court noted that "[i]n my over 30 years in this community, I've not seen anything like the publicity generated by this case." (RT PPEC at 90, 203-204.) In describing the public reaction to the verdict, the judge noted that "I've never seen anything like it before." (112 RT 20850.) The prosecutor agreed, characterizing the publicity as "pervasive and widespread" and recognizing that the publicity "surpassed the Manson case . . . and the O.J. Simpson case in terms of pre-trial publicity." (15 CT 4720-4721.) In its brief, the state notes the case received "an enormous amount of publicity" and the press coverage was "far-reaching and pervasive." (RB 246, 249.)

As Mr. Peterson also noted in his opening brief, there is no need to guess at what the impact of this publicity was. Nor is there any need to use techniques designed to predict whether a potential jury pool could be fair. Because defense counsel moved for a change of venue after nearly 1000 potential jurors had filled out questionnaires, there is no need to guess at all about the impact of the pretrial publicity on the venire. In fact,

there was substantial information about the impact of this publicity.

The state ignores this real world evidence entirely. (RB 242-246.) But, as noted in the opening brief, the real world figures were stark: 96% of the venire had been exposed to this publicity and nearly half of those exposed to the publicity (46%) -- and nearly half of the venire as a whole (45%) -- had reached a decision as to guilt. (14 CT 4516, 4520.) Of the 46% of the venire that had reached a conclusion, 98.6% believed Mr. Peterson was guilty of capital murder and more than half of those prospective jurors admitted they would not change their views. (14 CT 4516; AOB 175; AOB Appendix A.) *This even though not a single witness had been called.*

Ignoring these figures entirely, the state argues that this is not an extreme case. Given these stark numbers, it may well be that the state is implicitly asking this Court to overrule the presumed prejudice cases. If this is not an extreme case to which the presumption applies -- where half of all prospective jurors called for service had already reached a decision as to guilt, 98.6 % of that group was ready to convict defendant without hearing a single witness and half of that group refused to set aside their views to judge the case fairly -- then it is difficult to imagine a case where the presumption would apply.

Ultimately, as this Court has concluded, there is a common sense test for when pre-trial publicity will require a new trial: where the publicity has created "a cool, widely held conviction that defendant[] [is] guilty . . . ." (*People v. McKay* (1951) 37 Cal.2d 792, 797.) There is no need to guess at whether the publicity here created a "cool, widely held conviction that [Mr. Peterson] was guilty." 96% of the venire was exposed to the pretrial publicity. Of that group, nearly 50 percent relied on the pretrial publicity to reach a conclusion as to guilt. And of the hundreds and hundreds of prospective jurors that had, in fact, already reached a conclusion as to guilt, 98.6% thought Mr. Peterson was guilty of capital murder. On these facts, prejudice should be presumed and reversal required.

In making a contrary argument, the state presents a lengthy analysis of the 12 jurors ultimately selected to sit. (RB 255-270.) The state accurately notes that in some fashion or another, each of these 12 jurors said they would be fair and would decide the case based on the evidence heard in court. (RB 255-270.)

But the legal relevance of this fact is difficult to assess in light of the case law. (See *Irvin v. Dowd* (1961) 366 U.S. 717, 728 [reversing for prejudicial pre-trial publicity even though all 12 seated jurors said they would be impartial]; *People v. Williams*, *supra*, 48 Cal.3d at p. 1129 [same]; *People v. Tidwell* (1970) 3 Cal.3d 62, 73 [same].) These cases establish that where the community has indeed been saturated with prejudicial

pretrial publicity, declarations of fairness and rectitude from the 12 jurors selected to try the case are given little weight in the calculus:

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." (*Irvin v. Dowd*, *supra*, 366 U.S. at p. 728.)

The state accurately notes that in *United States v. Skilling* (2010) 561 U.S. 358 (involving the Enron collapse) the Supreme Court did not presume prejudice. (RB 243.) The states argues that the same rule should apply here. (RB 243-244.) But aside from citing barren principles of law from *Skilling*, the state does not discuss even a single fact on which the Court relied to conclude that the presumption of prejudice should not apply. (RB 243-244.)

Here is why. In *Skilling*, the Court rejected the presumption of prejudice where (1) defendant's trial occurred in the largest city in the state (and the fourth largest city in the country), (2) 43% of the venire had never heard of defendant, (3) publicity had diminished in the fours years since the collapse of Enron, (4) very little of the publicity named Skilling, (5) the jury acquitted on nine counts showing that it was not influenced by the publicity and (6) the publicity did not contain "prejudicial information" about

defendant. (561 U.S. at p. 381-384 and notes 15 and 16.) In contrast, in this case, (1) although counsel sought a transfer to the largest city in the state, trial occurred in the 13th most populous county in the state, (2) 100% of the venire had heard of defendant, (3) the publicity continued unabated from the crime through trial, (4) 100% of the publicity named defendant, (5) the jury convicted on all counts and (6) the publicity contained substantial amounts of prejudicial information, including references to non-existent and inadmissible evidence.

In the final analysis, the presumed prejudice test applies to extreme cases. The publicity which attended the Scott Peterson trial was beyond anything any of the participants had ever seen. If this is not an extreme case, then the term has lost all meaning. Reversal is required.

C. Given The Actual Voir Dire Results In This Case, Actual Prejudice Has Been Shown And Reversal Is Required.

Even in cases where prejudice is not presumed, reversal is still required if defendant shows actual prejudice. In his opening brief, Mr. Peterson contended that in establishing actual prejudice, there were three objective measures which courts examine: (1) the percentage of the venire exposed to the pretrial publicity, (2) the percentage of those exposed who have reached a conclusion as to guilt and (3) the percentage of those

who have reached a conclusion who admit they are unable to set aside the view they reached based on the publicity. (AOB 170-174.) Here, as noted above, 96% of the venire was exposed to the pretrial publicity, 46% of that group admitted they had reached a conclusion as to guilt and 98.6% of that group concluded Mr. Peterson was guilty. Of the 98.6% who had concluded Mr. Peterson was guilty, more than half refused to set aside their views and judge the case based on the facts. (AOB 174, 175.)

The state takes a different approach. Rather than look at what the voir dire *actually* shows about the impact of the publicity, the state employs a five-factor test and examines the size of the community, the gravity of the crime, the status of the defendant, the status of the victim and the nature of the publicity. (RB 246-254.) The state's reliance on this test is a bit puzzling.

To be sure, the five-part test on which the state seeks to rely here has a long provenance. (*See*, *e.g.*, *Maine v. Superior Court* (1968) 68 Cal.2d 375, 385; *Fain v Superior Court* (1970) 2 Cal.3d 46, 51-52; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293; *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 578; *Odle v. Superior Court* (1982) 32 Cal.3d 932, 937.) But as the captions of these cases show, the test was designed for use in the *pre-trial* context, where a trial court had denied a change of venue, and the defendant sought mandamus to revise the trial court's pre-trial ruling. The five-

part test was a useful tool to predict the impact of publicity on prospective jurors.

But once potential jurors have *actually* been questioned about the impact of publicity, there is no need to rest (or at least rest primarily) on a test designed to *predict* the impact of publicity. As this Court has noted, "the prejudicial effect of publicity before jury selection is necessarily speculative . . . ." (*People v. Williams*, *supra*, 48 cal.3d at p. 1125.) In contrast, after trial "the matter may then be analyzed in light of the voir dire of the actual, available jury pool and the actual jury panel selected." (*Ibid.*) "[R]eview on appeal differs from writ review in that after trial the review is retrospective." (*People v. Douglas* (1990) 50 Cal.3d 468, 495.) In making a retrospective determination of whether defendant received a fair trial "we examine 'the voir dire of prospective and actual jurors to determine whether pretrial publicity did in fact have a prejudicial effect.'" (*People v. Jennings* (1991) 53 Cal.3d 334, 360. *Accord People v. Balderas* (1985) 41 Cal.3d 144, 177.)

Here, although the state dutifully performs the five-factor test designed for the pre-trial context, it says little or nothing about "the voir dire of the actual, available jury pool." (*People v. Williams*, *supra*, 48 Cal.3d at p. 1125.) The state does not examine "the voir dire of prospective and actual jurors to determine whether pretrial publicity did in fact have a prejudicial effect.'" (*People v. Jennings*, *supra*, 53 Cal.3d at p. 360.)

But ignoring these basic facts will not make them go away. “Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." (John Adams (1770) Argument in Defense of the British Soldiers in the Boston Massacre.)

And in light of these facts, reversal is required. After all, in *Williams,* reversal was required where 52% of the venire had been exposed to the pretrial publicity, and 8.6% refused to set aside their belief in defendant’s guilt. (48 Cal.3d at p. 1128.) In *Tidwell*, reversal was required where 100% of the venire had been exposed to the pretrial publicity, 30% believed defendant was guilty and 12% refused to set aside their views. (3 Cal.3d at p. 65-68.) Here, 96% of the venire had been exposed to the pretrial publicity, 45% believed defendant was guilty based on that publicity and more than 51%

of that group refused to set aside their views. (14 CT 4516; AOB 175; AOB Appendix A.) Reversal is required here as well.[13]

D. Counsel's Decision To Make The Best Of A Bad Situation, And Not Use All His Peremptory Challenges Does Not Demonstrate That He Was Satisfied By The Jury As Selected.

In his opening brief Mr. Peterson noted that defense counsel used 16 of his peremptory challenges. (AOB 176.) In some detail he explained why under the defensive-acts doctrine this did not demonstrate that counsel himself had concluded the

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[13] In applying the pre-trial five-part test the state concedes that the capital nature of this case counsels in favor of a venue change, but correctly admonishes that this factor is "not dispositive." (RB 247-248.) This is entirely true -- even in the pre-trial context, none of the five factors is itself dispositive.

In connection with the size of the county, however, the state ignores this wise admonition entirely. The state notes cases in which venue motions have been (1) granted involving smaller counties and (2) denied involving larger counties. (RB 247.) But even where the five-part test has been applied in the pre-trial context "population size alone is not determinative." (*Fain v. Superior Court*, *supra*, 2 Cal.3d at p. 52, n.1.) "We do not intend to suggest, however, that a large city may not also become so hostile to a defendant as to make a fair trial unlikely." (*Ibid. See also Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 387, n.13.)

Thus, venue change motions have been granted in counties much larger than San Mateo. (*See*, *e.g.*, *Smith v. Superior Court* (1969) 276 Cal.App.2d 145 [issuing a writ of mandate to compel a change of venue in Los Angeles].) Venue change motions have been granted in San Mateo itself. (*See*, *e.g.*, *Steffen v. Municipal Court* (1978) 80 Cal.App.3d 623.) This Court's point in *Fain* and *Maine* is that depending on the nature and extent of the publicity, a fair trial may be impossible even in a larger county.

jurors were fair. (AOB 176-178.)

In a nutshell, the argument is this. 76 jurors had passed through both hardship and *Hovey* voir dire and were eligible to be seated. (18 CT 5620.) This collection of 76 prospective jurors was picked through a process to which counsel objected by seeking to change venue. That objection was denied. Having had his objection denied, defense counsel was fully entitled under the defensive-acts doctrine to make the best of a bad situation and try and pick the best 12 jurors from this collection of 76. If this meant that he did not use all of his challenges, that is exactly what the defensive-acts doctrine entitled him to do.

And that is exactly what counsel did here. At the time counsel elected not to use any more peremptory challenges, he had used 16 challenges, the state had used 13, and there were 12 people seated in the box. (15 CT 5621.) This left only 38 prospective jurors -- each of whom defense counsel had questioned and from whom defense counsel had an extensive juror questionnaire.

There are, of course, two dramatically competing inferences which can be drawn from counsel's decision not to use his remaining challenges. First, counsel could have done a complete about-face, realized that his prior position about the pretrial publicity

was wrong and concluded the jury had turned out entirely fair. Second, counsel could have simply been trying to get the best 12 jurors from the 76 from which he had been forced to choose over his objections.

The state urges this Court to adopt the first of these inferences. According to the state, counsel's decision to use only 16 peremptory challenges "demonstrated satisfaction with the jury as selected" and showed that counsel was "in fact satisfied with the jury" (RB 270, 271.) According to the state, if counsel had still been concerned about the fairness of the jurors he would have (1) exhausted his peremptory challenges and (2) then asked for more. (RB 271.) It almost goes without saying that the state does not explain on what conceivable ground defense counsel could have gotten more challenges after using those granted to him by statute. (RB 271.) Instead, the state says he should have just asked. (RB 271.)

With all due respect, this view of defense counsel's options has no basis in the real world. None. No such right to additional challenges exists. So it would make no real-world sense for defense counsel to risk seating jurors who he knew were less favorable simply so that he could make a completely baseless request for more challenges.

The fact of the matter is that at the moment defense counsel stopped using his challenges, there were only 38 prospective jurors left. He knew the views of every single one of them. If counsel thought he could get better jurors from this pool of 38, he would have continued using challenges. He did not. The logical inference is that counsel thought he had the best jurors in the group *from which he was being forced to choose*.

But this does not mean counsel was "satisfied with the jury as selected." It means he was satisfied that this was the best jury he was going to get given that his venue change motion had been denied and he had to select from the pool of 76 prospective jurors. And if counsel had used more challenges -- and worse jurors were seated -- in the real world he could neither have justified a request for additional challenges nor expected to get them.

In the final analysis, under the state's view, in order for defense counsel to show he still believed venue should have been changed, he would have to exercise all his peremptory challenges *even if that meant putting worse jurors on the panel*. This is precisely the type of kafkaesque result that the defensive-acts doctrine was designed to prevent. The contrary argument made by the state's appellate lawyers not only ignores the reason this Court has recognized a defensive-acts doctrine, but the way real trials work.

## IV. THE TRIAL COURT'S ADMISSION OF A TYPE OF DOG SCENT IDENTIFICATION EVIDENCE WHICH HAD NEVER BEFORE BEEN ADMITTED IN ANY CASE IN THE COUNTRY, AND ITS DECISION TO DO SO ABSENT A SCIENTIFIC BASIS SHOWING THE EVIDENCE WAS EITHER RELIABLE OR GENERALLY ACCEPTED, REQUIRES REVERSAL.

### A. Introduction.

The state's theory of this case was that Mr. Peterson killed his wife in Modesto and put the body in his truck for transport to his warehouse. (109 RT 20202.) Under the state's theory, at the warehouse he put Laci in the boat, attached the cement weights to her, and fully covered the boat. (109 RT 20203.) He then drove to the Berkeley Marina and backed the boat down the loading ramp with the cover on. (109 RT 20204.) After he parked his truck, he took the cover off the boat, used it to cover Laci's body and motored into the bay. (109 RT 20204.)

Four days later -- on December 28, 2002 -- dog handler Eloise Anderson brought her trailing dog Trimble to the Berkeley Marina. (84 RT 16078.) Anderson was not asked to use Trimble to check the marina generally for any of Laci's scent; instead, she was asked by police specifically to search the boat ramp and the adjacent pier for Laci's scent. (84 RT 15997.)

In order to accomplish this goal, Anderson had to give Trimble an item with Laci's scent on it. Anderson used pair of sunglasses taken from Laci's purse. (8 RT 1516-1517.) Anderson knew at the time that Scott had handled the purse. (8 RT 1552.) She did not know if Scott had handled the sunglasses themselves, and she failed to perform a "missing member" test to ensure Trimble did not search for Scott's scent rather than Laci's. (8 RT 1552; 85 RT 16133-16134.) This failure was important because the sunglasses had been collected by dog handler Cindee Valentine, who picked up the glasses after picking up Mr. Peterson's slippers. (7 RT 1381-1383.)

Anderson explained that when a dog detects a scent, what it is really detecting are skin rafts -- microscopic skin cells that come off a subject. (8 RT 1548.) According to Anderson, Trimble detected Laci's skin rafts near the boat ramp and followed the trail onto the pier and out to the end of the pier. (84 RT 16085.) Trimble detected these skin rafts even though it was conceded that only Scott, not Laci, had actually been exposed to the open air on the boat ramp and on the pier. Yet, according to the prosecutor, this evidence established guilt of capital murder, "as simple as that." (111 RT 20534.)

In his opening brief, Mr. Peterson contended the trial court violated both state and federal law in admitting the dog scent evidence because (1) the evidence did not meet the foundational requirements for admission of dog scent evidence under state law (AOB

206-228) and (2) the evidence was too unreliable to admit in a capital case under federal law. (AOB 228-230.) Admission of this evidence required reversal because the case was close and the nature of the dog scent evidence was highly incriminating. (AOB 230-238.)

The state disagrees. The state first argues that admission of the dog scent evidence did not violate state law. (RB 295-302.) Turning to the federal law component of the claim, the state argues the claim was waived by trial counsel's failure to cite the Eighth and Fourteenth Amendments when he made his objection. (RB 314-315.) Finally, the state argues that any error was harmless. (RB 304-313.) Mr. Peterson will address each argument in turn.

As discussed more fully below, the dog scent identification offered in this case was unique. Unlike most cases involving dog scent detection, the state did not use Trimble to detect the scent of a suspect fleeing on foot. Instead, the state claims Trimble detected Laci's skin rafts which had emanated from a closed vehicle -- the covered boat in which the state theorized she had been brought to the marina. This, even though (1) Trimble's training history showed that in such searches, she was wrong 67% of the time, (2) no court in the country had ever admitted the results of this kind of dog scent identification and (3) one of the state's own experts admitted there was no agreement on whether this kind of scent detection was even possible.

### B. The Trial Court's Admission Of The Dog Scent Evidence Violated State Law.

In his opening brief, Mr. Peterson contended that the trial court violated state law in admitting evidence of Trimble's alert at the Berkeley Marina. (AOB 204-227.) His thesis was simple.

The case law had identified three types of dog scent evidence: dog tracking evidence, dog trailing evidence and dog scent lineups. (AOB 208.) There are different foundational requirements for each type of evidence. (AOB 208-211 [dog tracking evidence]; 211-214 [dog trailing evidence];214-217 [dog scent lineups].) Here, the state did not present sufficient foundation to support admission of the dog evidence regardless of the category into which Trimble's alert is placed. (AOB 218-221 [inadequate foundation to support admission as dog tracking evidence]; 222-223 [inadequate foundation to support admission as dog trailing evidence]; 223-228 [inadequate foundation to support admission as dog scent evidence].)

The state disagrees. With respect to the dog tracking requirements, the state argues that the foundational requirements *were* met, and that admission of the evidence was therefore proper. (RB 295-299.) With respect to the dog trailing and dog scent foundational requirements, the state argues they do not apply to this case. (RB 290-291

[dog trailing]; 291-291 [dog scent].) The state does not argue that if they apply, these other foundational requirements were met. (RB 271-315.)

As discussed below, there are five factors the state must establish to introduce dog tracking evidence. Because the state did not establish four of these five factors, the evidence was not properly admitted as dog tracking evidence. And because the state does not now argue that the evidence was properly introduced in the alternative as dog trailing or dog scent evidence, the evidence should not have been admitted.

1. The foundational factors for dog tracking evidence.

The state argues that the evidence was properly admitted as dog tracking evidence because it met the five foundational requirements for this type of evidence set forth in *People v. Malgren* (1983) 139 Cal.App.3d 234. The state is wrong.[14]

The first of the *Malgren* factors is that "the dog's handler was qualified by training

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[14] The five factors which the state must establish are "(1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated." (139 Cal.App.3d at p. 238.)

and experience to use the dog . . . ." (*Malgren*, *supra,*139 Cal.App.3d at p. 238.) Courts around the nation have recognized that in evaluating whether a dog handler is qualified to use a dog, the handler must have been trained to avoid the practice of "handler cuing." (*United States v. One Million, Thirty-Two Thousand, Nine Hundred Eighty Dollars* (N.D.Ohio 2012) 855 F.Supp.2d 678, 699 [upholding search where dog handler had received "training and evaluation [which] included instruction on handlers avoiding queuing (sic] and/or prompting."]; *State v. Hezler* (Or. 2011) 350 Or. 153, 159 [invalidating search where "the record does not reveal what training [the dog handler] received to avoid handler cues or other errors that can cause a dog to alert falsely."].) In examining the adequacy of a dog handler's training, "the handler's training should include . . . warnings against handler cues . . . ." (*State v. England* (Tenn. 2000) 19 S.W.3d 762, 768. *Accord Commonwealth v. Santiago* (Mass. 2012) 30 Mass.L.Rptr. 81; *Harris v. State* (Fla. 2011) 71 So.3d 756, 768, *overruled on other grounds* 133 S.Ct. 1050 (2013) ["'Handler error affects the accuracy of a dog. The relationship between a dog and its handler is the most important element in dog sniffing, providing unlimited opportunities for the handler to influence the dog's behavior.' . . . Therefore, the trial court must also focus on the training of the handler."].)

As the proponent of the evidence, of course, it was the state's burden to establish the *Malgren* factors. In this case, there was no evidence at all that Anderson had *any*

training in avoiding handler cues. And the Court need look no further than this case to understand the importance of guarding against handler cuing. In describing Trimble's history of successful searches, Anderson admitted that "most of the time we know where the trail is." (85 RT 16108.) Indeed, the state's own witnesses conceded that in connection with Trimble's search in this case, they did *not* ask Anderson to search the general marina area with Trimble; instead, they specifically asked her to search the "boat

ramp" area to look for "an entry or exit trail" there. (84 RT 15997.)[15]

The state fares no better in connection with the second and third *Malgren* factors. These required the state to establish that Trimble was adequately trained and reliable in tracking humans. (139 Cal.App.3d at p. 238.) The state argues that it did just that, noting

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[15] The state ignores the case law regarding handler cuing entirely. But the reason courts are concerned with handler cuing is the long-recognized risk that dog handlers may intentionally or unintentionally encourage their dogs to a false alert. (*United States v. Heir* (D. Neb. 2000) 107 F.Supp.2d 1088, 1096; *United States v. Trayer* (D.C. Cir. 1990) 898 F.2d 805, 809 (D.C.Cir.1990); *United States v. $80,760.00* (N.D. Tex, 1991) 781 F.Supp. 462, 478 n. 36.) The state minimizes this risk, suggesting -- without citing any authority at all -- that concerns about handler cuing in California are "entirely unfounded." (RB 297.)

But as just discussed in text, not only does the record of this case itself bely this assertion but recent studies have reiterated the danger of handler cuing in California dog teams. For example, one recently published California study was designed "to determine whether handler beliefs of target scent location would affect outcomes in scent detention dogs to detect their target scents." (14 Animal Cognition 387 (May 2011) at p. 388.) The study used California scent detection teams (that is, a dog and a handler) that -- just like Trimble and Anderson here -- had been certified. (*Ibid.*) In order to evaluate "outcomes solely based on handler beliefs and expectations, the study was designed so that any alert issued would be a 'false' alert; that is, there was no target scent present . . . ." (*Ibid.*)

To describe the results as stark would be an understatement. When handlers were aware of where the target scent was supposed to be, they communicated this information to their dogs -- resulting in false alerts -- a remarkable 85% of the time. (*Id*. at p. 390.) This is why case law throughout the country recognizes that training must include avoidance of handler cuing. The state's insistence that concerns about handler cuing are "entirely unfounded" -- and should therefore simply be disregarded in the calculus of assessing reliability -- ignores the case law, the scientific research and common sense as well. The state cites nothing at all to support its contrary position.

Trimble's history of success in trails in various "scent environments and terrains." (RB 297.)

In placing its primary reliance on Trimble's history, however, the state is trying to fit a square peg into a round hole. It has confused (1) Trimble's success in trails where the subject was fully exposed to the search area ("open-air subject searches") with (2) Trimble's near-complete failure in trails where the subject passes the search area in a confined vehicle ("closed-container subject searches"). And it has completely ignored the testimony of Trimble's own handler that Trimble detects scent by detecting "skin rafts" -- tiny skin particles -- that come off the human body. (8 RT 1548.)

There should be no dispute that Trimble's history makes two points clear. First, Trimble's history shows a series of successful open-air subject searches -- where the skin rafts Trimble was asked to detect had *not* been enclosed or shielded in any way from the area to be searched. Mr. Peterson concedes that Trimble's training record showed she could -- in a variety of settings -- reliably detect and track skin rafts in open-air searches where the subjects had been fully exposed to the search area, either on foot or bicycles. (8 RT 1490-1508.) In both of these settings, the subjects' skin rafts may freely migrate into the surrounding environment.

But Trimble was also asked to detect skin rafts in far lower concentrations, where the subjects were *not* openly exposed to the area to be searched, as where they were confined in a car or truck. The purpose, of course, was to see if Trimble could reliably detect and track skin rafts at a much lower level than when the subject was fully exposed to the search area. Trimble's history here showed that she had been asked to do this kind of closed-container subject search three times, and had failed twice. (8 RT 1505-1506 [successful closed-container skin raft trail in July 2003]; 8 RT 1541 [unsuccessful closed-container skin raft trail in May 2001]; 85 RT 16116-16119, 16146 [unsuccessful closed-container skin raft trail in October 2002].)[16]

Assessing whether the state established Trimble's reliability at trial requires the Court to determine the type of search Trimble performed here. Given Anderson's testimony that skin rafts are the source of scent, it follows that in every search Trimble is trying to detect skin rafts.

However, Trimble's history shows a marked distinction in her ability to detect skin

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[16] For reasons that are not entirely clear, the state insists there was only one unsuccessful trail, suggesting that an April 2001 failure should not count. (RB 298, n.122.) As the above text makes clear, Mr. Peterson is not counting the additional April 2001 failure at all, but only the unsuccessful closed-container subject trails of May 2001 and October 2002. If the April 2001 trail is also counted -- because Anderson herself conceded that Trimble "took me on a wrong turn there" (8 RT 1549) -- then Trimble's record is even worse, i.e., a 25% success rate.

rafts depending on whether the subject is actually exposed to the search area. In closed-container subject searches -- where the subject is *not* actually exposed to the search area as where he or she is confined in a car or truck -- Trimble's history shows her to be accurate only 33% of the time. Given that flipping a coin would result in being right half the time, an accuracy rate of 33% cannot possibly satisfy *Malgren.* (*Compare People v. Mitchell* (2003) 110 Cal.App.4th 772, 779-780 [dog deemed reliable where history showed he had made no mistakes in training exercises]; *People v. Malgren*, *supra*, 139 Cal.App.3d at p. 238 [same]; *People v. Craig* (1978) 86 Cal.App.3d 905, 917 [same].) A 33% success rate is insufficiently reliable to justify admission. (*See People v. Murtishaw* (1981) 29 Cal.3d 733, 768 [excluding expert opinion on future dangerousness as based on unreliable foundation where "such predictions are wrong more often than they are right".].) Indeed, as pointed out in Appellant's Opening Brief, the FBI requires a success rate of 90% before admitting dog scent identification evidence. (AOB 219.)

No California case has ever approved admission of dog scent evidence with a 33% record of reliability. No case anywhere in the country has approved admission of such evidence with such a track record of unreliability. And because that is exactly the type of search involved here, Trimble's reliability was not established at all.

In an effort to avoid Trimble's history in closed-container subject searches, the

state argues that "the evidence at issue here was not a vehicle trail." (RB 302.) This is important to the state's position; the state repeats that that Trimble's search "did not involve her trailing of a vehicle." (RB 289.)

*Of course Trimble's search did "not involve the trailing of a vehicle."* Nor did any of Trimble's various failed training exercises. Trimble was not trailing or tracking a vehicle in either situation. She was trying to detect skin rafts from a person, just as she does in every search.

But the point of the matter is that Trimble's marina search -- as well as her failed training exercises -- both involved closed-container subject searches where Trimble was trying to detect skin rafts of a subject who had *not* been exposed to the search area but who had been confined to, and transported in, a vehicle of some kind. The prosecutor conceded that under the state's theory, Laci had been transported in the covered boat. (109 RT 20203.) And Trimble's 33% accuracy rate in this kind of closed-container search shows that Trimble could *not* reliably perform this exact kind of search.

The fourth *Malgren* factor which the state was required to establish was that "the dog was placed on the track where circumstances indicated the guilty party to have been." (139 Cal.App.3d at p. 238.) In *Malgren*, for example, witnesses saw a burglar flee a

house. Within half an hour, the tracking dog was placed exactly where the burglar had been seen and it then tracked the burglar to a nearby clump of bushes where he was hiding. The fact that the dog was placed where independent evidence showed the burglar to have been was deemed important to establishing the reliability of the inference that the scent picked up at the house was the same as the scent of the burglar. (*See also People v. Craig*, *supra*, 86 Cal.App.3d 905 [dog placed on track starting at the robbers' parked car and tracked robbers to where they were arrested]; *People v. Gonzales* (1990) 218 Cal.App.3d 403 [dog placed on track where burglar fled house].)

Here, the precise factual question to be answered was whether Laci had ever actually been at the marina. In contrast to *Malgren*, no independent evidence showed that Laci was ever at the marina. The best the state could do is show that Trimble was placed at a spot which was within *several miles* of where the bodies were ultimately found four months later. This does not come close to satisfying the fourth *Malgren* factor.

In short, the state did not establish any of the first four foundational factors under

*Malgren*. Admission of this evidence violated state law.[17]

2. The foundational requirements for dog trailing evidence.

The *Malgren* factors -- discussed above -- arose in a very basic dog scent context. There, the tracking dog followed a defendant's scent, as he fled on foot, to a bush where the defendant was found hiding.

In *People v. Willis* (2004) 115 Cal.App.4th 379, the Court of Appeal recognized the need for additional foundational requirements in connection with a different type of dog scent identification evidence. In contrast to *Malgren*, the dog in *Willis* did not pursue

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[17] The state seeks refuge in the abuse of discretion standard applicable to a trial court's rulings on evidentiary matters. (RB 295.) The state relies on this Court's statement that discretion is abused when the trial court "exceeds the bounds of reason" or acts in an "arbitrary, capricious or patently absurd manner." (RB 295 citing *People v. Montes* (2014) 58 Cal.4th 809, 859-860; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Mr. Peterson recognizes, of course, that where a trial court's ruling "exceeds the bounds of reason," or is "arbitrary, capricious or patently absurd," this will constitute an abuse of discretion. But as numerous courts have recognized, these colorful descriptions are not required for a finding of an abuse of discretion. (*See People v. Jacobs* (2007) 156 Cal.App.4th 728, 736-737; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297; *Department of Parks and Recreation v. State Personnel Board* (1991) 233 Cal.App.3d 813, 831 n.3.) Colorful descriptions aside, the ultimate question is whether the trial court's ruling was unreasonable in light of the governing law and the facts presented. (*People v. Jacobs*, *supra*, 156 Cal.App.4th at pp. 737-738.) Here, because the state failed to establish 4 of the 5 *Malgren* factors, that is exactly the case.

and then locate a fleeing suspect. Instead, and very much like this case, the dog in *Willis* was scented with certain items and asked to detect that same scent in another location. (*Id*. at p. 384.) In this situation, *Willis* held that the state must introduce "academic or scientific" evidence establishing (1) how long scent remains at a location, (2) whether scent (like fingerprints or DNA) is unique, (3) whether a particular breed of dog has acute powers of scent and (4) the adequacy of the certification procedures for scent identification. (*Id*. at p. 386.)

Trimble was asked to do exactly the same thing as the dog in *Willis*. She was given Laci's scent on an item. She was then asked to detect that scent in a particular location. Thus, the prosecution was also required to meet the *Willis* factors here.

The state does not argue that it met the *Willis* factors. (RB 275-315.) Instead, the state argues that the *Willis* factors simply do not apply here. (RB 290-291.) The state points to two differences between the dog search in *Willis* and the dog search here. First, the state notes that in *Willis*, the dog handler provided the scent to the dog by using a scent pad from a scent transfer unit, rather than using the original object itself. (RB 291.) Second, the state notes that the original object from which the scent was taken in *Willis* may not have been the defendant's. (RB 291.) In the state's view, this means the additional foundational requirements identified in *Willis* should not apply here.

The state is correct that police used a scent transfer unit in *Willis*. That is why, in a separate part of its opinion, the appellate court in *Willis* ruled that the state was required to meet the requirements of *People v. Kelly* (1976) 17 Cal.3d 24, for admission of novel scientific techniques. (*People v. Willis*, *supra*, 115 Cal.App.4th at p. 385.) But the *Willis* court went on to explicitly set aside "the *Kelly* rule deficiency in this case" and look at the dog identification evidence itself without the scent transfer unit issue. (*Id.* at p. 386.) The court noted that dog scent identification -- that is, giving a dog a scent and seeing if the dog alerts to that scent in other locations -- is so qualitatively different from the type of scent identification involved in *Malgren* that additional foundational requirements had to be met. (*Id.* at p. 387.) In short, the distinctions the state now identifies between this case and *Willis* have nothing at all to do with the additional foundation that case required.

As noted above, the state does not argue that it met the *Willis* factors. With good reason. The state presented no academic or scientific evidence showing how Laci's scent could migrate from under a tarp in the boat, across the water and onto the pier, no evidence about how long such a scent would remain in the marine environment of a pier, no evidence regarding the uniqueness of scent, and no evidence at all showing that Trimble was certified as reliable for the specific type of skin raft detection performed here. The evidence was inadmissible under *Willis*.

### 3. The foundational requirements for novel dog scent identification techniques.

In *People v. Mitchell*, *supra*, 110 Cal.App.4th 772, the Court of Appeal held that where a novel technique for dog scent identification was used, it had to meet the requirements of *People v. Kelly*, *supra*, 17 Cal.3d 24. (*People v. Mitchell*, *supra,* 110 Cal.App.4th at p. 793.) This required the state to establish that (1) the technique used was generally accepted in the community, (2) the expert was properly qualified and (3) the expert used proper procedures. (*Kelly*, *supra*, 17 Cal.3d at p. 30.)

The state does not argue that the trial court here held a *Kelly* hearing, or that the state introduced sufficient evidence to meet the requirements of *Kelly*. (RB 272-315.) Instead, the state argues that no *Kelly* hearing was required. The state accurately notes that (1) *Mitchell* involved a dog scent identification made from scent pads which were scented by a scent transfer device and (2) this case does not involve scent pads or a scent transfer device. (RB 291, 294.) Accordingly, the state argues that *Kelly* does not apply because there was "nothing new" about the dog evidence here. (RB 294-295.)

In fact, however, although the state says there is "nothing new" about the evidence presented here, the state cannot cite a single authority from California that has ever introduced a closed-container skin raft search like that permitted here. (RB 275-315.) It

cannot cite a single authority from any sister state that has introduced a closed-container skin raft search like that permitted here. (RB 275-315.) It cannot cite a single authority from any federal jurisdiction that has introduced a closed-container skin raft search like that permitted here. (RB 275-315.) Instead, to support its position that there is nothing new here -- and that the *Kelly* test should therefore not apply -- the state relies on an anecdotal exchange between Phillip II of France and Richard I of England regarding the reliability of Roswell the Hound in the 12th century. (RB 293.)

That dog won't hunt. As concededly amusing as the royal exchange is, suffice it to say here that Roswell the Hound was never asked to do what Trimble was asked to do here. It may well be that somewhere in the United States, sometime, the state in a criminal case asked a dog to detect skin rafts in this way. But as the complete lack of authority in the state's brief suggests, the dog's answer has never before been admitted in a court of law. So while it is certainly true that this case does not involve scent pads like *Mitchell*, the fact remains it involves an equally novel dog scent technique, one that has never been admitted in *any* court at *any* time in *any* jurisdiction. This is *exactly* the type of novel procedure which *Kelly* was designed to address.

But that is not the only *Kelly* problem with this novel evidence. As Mr. Peterson pointed out in the opening brief, *Kelly* requires as a condition of admissibility that the

technique be “generally accepted as reliable in the relevant scientific community.” (*Kelly*, *supra*, 17 Cal.3d at p. 30.) Here, the *state’s own expert* on canine scent detection candidly admitted that there was no general agreement that dogs could successfully perform the type of skin raft detection performed in this case. (9 RT 1701.)
Like the use of the scent transfer unit in *Mitchell*, the skin raft detection in this case thus involved an entirely novel technique which is not generally accepted as reliable.

This Court has recently noted the important roles trial courts should play as gatekeepers in protecting the jury from being exposed to unreliable expert testimony. “Under California law, trial courts have a substantial ‘gatekeeping’ responsibility.” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 769.) Absent proper foundation by the party offering expert testimony, the trial court must “act[] as a gatekeeper to exclude expert opinion testimony . . . .” (*Id*. at p. 771.)

Here, the trial court did nothing of the sort. The trial court admitted skin raft detection evidence the likes of which not only has never before been used in California, but has not been used in any other state or in any federal jurisdiction. The court permitted this absent *any* foundation that the type of skin raft detection here was generally accepted in the scientific community. To the contrary, one of the state’s own witnesses conceded the exact opposite. The evidence was improperly admitted.

### C. The Federal Components Of This Claim Were Not Waived By Trial Counsel's Failure To Reference Federal Law When Objecting.

In his opening brief, Mr. Peterson contended that admission of this unreliable evidence also violated his federal constitutional rights. (AOB 228-230.) The state argues that trial counsel's failure to cite the federal constitution when objecting to the evidence forfeits the issue. (RB 314-315.) This argument ignores controlling authority from this Court. Contrary to the state's position, shortly before trial in this case this Court held that federal constitutional objections to admission of evidence are *not* defaulted merely because the defense lawyer fails to cite the federal constitution. (*People v. Yeoman* (2003) 31 Cal.4th 93.)

In *Yeoman* the state introduced evidence to which defendant objected, citing the federal and state due process and equal protection clauses. (31 Cal.4th at p. 133.) For the first time on appeal, defendant argued that the admission of the evidence also violated the Eighth Amendment. (*Id.*) The state argued that the federal component of the claim was waived. (*Id.*) The Court rejected this argument, because "[d]efendant's new claim . . . merely invites us to draw an alternative legal conclusion (i.e., that the death sentence is arbitrary and unreliable) from the same information he presented to the trial court." *(Id.*)

In reaching this result, *Yeoman* did not break new ground. At the time of trial here

the rule had long been that where a trial court admitted evidence over defense objection, the merits of a claim that admission of the evidence violated the federal constitution would be addressed *even where there was no federal constitutional objection at trial*. (*See*, *e.g.*, *People v. Gurule* (2002) 28 Cal.4th 557, 654 [objection to evidence as prejudicial sufficient to preserve merits of federal constitutional due process claim]; *People v. Lewis* (2001) 25 Cal.4th 610, 636-637 [same]; *People v. Jones* (1998) 17 Cal.4th 279, 305-306 [same]; *People v. Lucas* (1996) 12 Cal.4th 415, 448-450 [same]; *People v. Sakarias* (2000) 22 Cal.4th 596, 628 [hearsay objection sufficient to preserve merits of federal constitutional Sixth Amendment claim]; *People v. Reed* (1996) 13 Cal.4th 217, 221, 228-229 [same]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1119-1120 [same]; *People v. Arreola* (1994) 7 Cal.4th 1144, 1150, 1157, 1159 [same]; *People v. Pride* (1992) 3 Cal.4th 195, 243-244 and n.14 [objection based on relevancy sufficient to preserve merits of federal due process claim]; *People v. Clair* (1992) 2 Cal.4th 629, 737 [same]; *People v. Bacigalupo* (1992) 1 Cal.4th 103, 130-133 [state statutory objection sufficient to preserve merits of federal full faith and credit clause objection]; *People v. Holloway* (2004) 33 Cal.4th 96, 143 [objection based on relevancy sufficient to preserve merits of federal Eighth Amendment claim].)

The reason for this common sense approach is simple. In most situations, citation to the federal constitution "merely restates, under alternative legal principles, a claim

otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 117.) Or, put more simply, the law does not require idle acts. (Civil Code section 3532.)

That is exactly the case here. As the state concedes, this is not a case where defense counsel failed to object to admission of the evidence. Here, defense counsel objected, specifically asking that this evidence be excluded. In other words, citation of the federal constitution would not have required the trial court to apply any different analysis to defense counsel's objection.

Respondent's contrary argument exalts form over substance. It is supported neither by common sense, policy, or precedent. And it completely ignores the general rule set forth in *Yeoman*, and the Court's specific applications of that rule in *Gurule*, *Lewis*, *Jones*, *Lucas*, *Sakarias*, *Reed*, *Rodrigues*, *Arreola*, *Pride*, *Clair*, *Bacigalupo* and *Holloway*. The federal component of Mr. Peterson's argument is properly before this

Court.[18]

D. Given The Prosecutor's Reliance On The Dog Scent Evidence, The Natural Tendency Of Jurors To Credit Such Evidence, And The Record As A Whole, Reversal Is Required.

The state concedes that admission of the dog scent evidence "provided the prosecutor with additional incriminating evidence to admit at trial." (RB 302.) The state also concedes that in addition to presenting the evidence, the prosecutor specifically relied on it in closing, telling the jury that if it found the scent evidence credible, Mr. Peterson was guilty "as simple as that." (RB 305.)

The state nevertheless argues that any error was harmless for four reasons. First, the state takes a mathematical approach to harmless error noting that (1) in relying on the dog scent evidence, the prosecutor only used 19 words (RB 305) and (2) the defense only discussed the dog evidence for 3 pages out of a 161-page closing. (RB 306.) Second, the

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[18] In making its contrary argument, the state relies on a case published *after* trial in this case. (RB 315 citing *People v. Partida* (2005) 37 Cal.4th 428.) *Partida* does not aid the state.

There, trial counsel objected to certain evidence based on Evidence Code section 352. On appeal -- and in accord with the case law discussed above -- this Court held that counsel did *not* have to cite the federal constitution to preserve an objection based on due process since a due process objection would not have required the trial court to perform any different analysis at trial. (37 Cal.4th at p. 431, 435.)

defense thoroughly confronted Anderson's testimony by introducing evidence that Ron Seitz's dog did not alert at the Berkeley Marina. (RB 306.) Third, the trial court's instruction on dog evidence provided the jury with "meaningful guidance." (RB 306.) Finally, the other evidence of guilt was overwhelming. (RB 307-313.)

The state's reliance on percentage of defense counsel's closing argument devoted to the dog evidence is clever, but misleading. *The record shows that the prosecutor here saved his argument about the dog tracking evidence until his rebuttal argument in closing*. Thus, when defense counsel stood up to make his closing argument, he was certainly under the impression that the prosecution had apparently decided *not* to focus on the dog tracking evidence. Seen in this light, defense counsel's decision to nevertheless focus three full pages of argument on an issue the state had totally neglected in its initial argument shows how important defense counsel believed this evidence to be. And the prosecutor's decision to focus on the dog evidence in his rebuttal -- when defense counsel had no chance to respond -- makes the argument that much more powerful:

> "If Laci Peterson's scent is at the Berkeley Marina, then he's guilty. I mean that's as simple as that." (111 RT 20534.)

Courts have long recognized that references by a prosecutor to evidence during the rebuttal phase of closing arguments can be particularly prejudicial for two reasons. First,

these comments come when defense counsel is "unable to respond." (*United States v. Miller* (8th Cir. 2010) 621 F.3d 723, 732.) Second, they come immediately before the jury begins deliberations, which "likely eliminate[s] the possibility that the jury remained somehow immune to the potential prejudicial effect of the comments." (*Ibid. Accord United States v. Combs* (9th Cir. 379 F.3d 564, 574.) That is exactly the case here.

The state correctly notes the prosecutor's comment was only 19 words long. (RB 305.) But the state never explains why the prosecutor would have to go on and on and on about this simple evidence in order for admission of the evidence to have had a prejudicial impact on the jury. Contrary to the argument at least implicit in the state's position, jurors are not stupid. They get it. Or, as Justice Brown noted some time ago, "juror[s] [are] not some kind of a dithering nincompoop[s], brought in from never-never land . . . ." (*People v. Guiuan* (1998) 18 Cal.4th 558, 578 [Brown, J., concurring and dissenting].)

The state then argues any error was harmless because the defense thoroughly confronted Anderson's testimony by introducing evidence that Ron Seitz's dog did not alert which "may have lessened the weight of the trailing evidence . . . ." (RB 306.) But this was certainly *not* the inference which the state asked the Court to draw from this evidence earlier in its brief, where the state argued that this very same evidence from

Seitz -- far from *confronting* Anderson's testimony -- actually "corroborated" it. (RB 299.)

The Court need not linger over the patent inconsistencies in the state's positions. At the end of the day it is clear that if Anderson's testimony had really been thoroughly impeached as the state now suggests, it is unlikely that (1) the prosecutor would have relied on the evidence in urging the jury to convict "as simple as that" or (2) defense counsel would have spent three pages giving the jury reasons to discount the evidence. The concededly ingenious -- if not entirely consistent -- views of the state's current set of appellate lawyers as to what was important at the 2004 trial are no substitute for the contemporaneous actions of the parties who actually saw and heard the dog scent testimony. And their actions show they viewed this testimony as important.

The state adds that the trial court's instruction on dog evidence provided "meaningful guidance" to the jury. (RB 306.) The state does not define what it means by "meaningful guidance." In fact, however, the instruction given here told jurors they could convict based on the dog evidence so long as there was some "other evidence that supports the accuracy of the dog tracking evidence," whether that evidence was direct or circumstantial. (19 CT 6071.)

The propriety of this instruction itself is discussed in greater detail in Argument V, *infra*. But it is worth noting here that the state itself now concedes this instruction created a presumption which actually allowed the jury to presume all elements of murder from (1) the dog tracking evidence and (2) some evidence supporting the accuracy of that evidence. (RB 324-325 [conceding that the instruction "created a permissive inference" which permitted the jury to infer "that appellant murdered Laci"].) As the state's concession shows, far from providing "meaningful guidance," the court's instructions actually permitted the jury to infer guilt from improperly admitted evidence. This hardly aids the state's harmless error argument.

Finally, the state argues that there was overwhelming evidence of guilt. (RB 307-313.) Because the state makes this a part of several harmless error arguments in its brief (*see* RB 335, 356, 402-403) -- and because the argument is both legally and factually flawed -- Mr. Peterson will address it in some detail here.

The prosecutor conceded at trial he could not prove *when* the crime occurred. (109 RT 20200.) The trial court found, and the prosecutor later conceded, there was no evidence showing *how* the crime occurred. (108 RT 20163; 109 RT 20200.)

The state concedes this, but argues that none of this really matters -- the only

question was *who* killed Laci. This argument certainly has an appealing rhetorical flair to it.

But it makes no sense. The state's theory that Scott Peterson was the killer depended on the killing occurring at a certain time, in a certain place, and in a certain way.

For example, the state theorized that Scott killed Laci at the Peterson home. But there was no physical or forensic evidence to support the theory -- no blood or tissue was found at the house, there were no signs of foul play at the house and none of the neighbors saw or heard anything suspicious. (48 RT 9444-9448; 50 RT 9832; 57 RT 11164-11165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) The state theorized that after Scott killed Laci, he transported her in his truck to the warehouse. But there was no physical or forensic evidence to support this part of the state's theory either. (67 RT 12946-12952, 12959-12960, 12963-12965; 90 RT 17149-17156.) The state theorized that Scott later wrapped the body in a tarp which was found in the truck. But there was no physical or forensic evidence tying the tarp to any crime at all. (66 RT 12876.) The state theorized that Scott had made anchors to weigh down the body. But despite searching the bay for weeks and weeks with sophisticated sonar devices and specialized dive teams from the FBI, there was no evidence at all to support

this part of the state's case either. (64 RT 12644-12645; 65 RT 12709-12710, 12779, 12786-12787; 66 RT 12813-12815, 12819-12820, 12837.)

In short, there were major gaps in the state's case. They cannot be filled by a rhetorical sleight of hand.

Given the lack of direct evidence, this case would come down to competing inferences from circumstantial evidence. To its credit, the state goes on to discuss some of the circumstantial evidence in the case. Perhaps understandably, however, in its harmless error argument the state solely focuses on pieces of evidence which support its belief in Mr. Peterson's guilt. By way of example only, the state cites as overwhelming evidence of guilt (1) the purchase of a boat which "he never told anyone about," (2) the explanation that he had gone fishing that day for sturgeon when, in fact, a state expert testified that Mr. Peterson "did not have the right gear for catching sturgeon," (3) the affair with Amber Frey and desire for a life free from the responsibilities of children and (4) the trips to the Berkeley Marina where police were searching for Laci, trips which the states were taken "to see if searchers were looking in the right place." (RB 307-309.)

The state's approach to harmless error analysis -- focusing solely on evidence which supports an inference of guilt -- confuses the test for assessing harmless error with

the very different test for assessing sufficiency of the evidence. In assessing the sufficiency of the evidence, a reviewing court assesses the evidence in the light most favorable to the judgment, accepting all logical inferences the jury could draw in favor of the judgment. (*People v. Eliot* (2005) 37 Cal.4th 453, 466.) That is exactly what the state has done here, albeit in the context of harmless error.

But harmless error review is very different. Harmless error review requires the reviewing court to make a straightforward assessment of the consequences of an error based on an objective review of *all* the evidence presented, not simply evidence and inferences which support the verdict. Thus, the Supreme Court has long made clear that proper harmless error review requires "the whole record be reviewed in assessing the significance of the errors." (*Yates v. Evatt* (1991) 500 U.S. 391, 409. *Accord Rose v. Clark* (1986) 478 U.S. 570, 583; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *United States v. Hasting* (1983) 461 U.S. 499, 509 (1983). This Court too has recognized that proper harmless error review requires the reviewing court to consider the *entire* record, not just bits and pieces of evidence which the state says support the conviction. (*See People v. Mil* (2012) 53 Cal.4th 400, 417-418; *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1013; *People v. Taylor* (1982) 31 Cal.3d 488, 499-500.) As one federal court has noted, in analyzing prejudice a reviewing court "does not simply examine whether there was sufficient evidence to support the conviction . . . ." (*Cooper v. McGrath* (N.D. Cal.

2004) 314 F.Supp.2d 967, 988.) Indeed, were it otherwise, constitutional errors would only be prejudicial where there was insufficient evidence to convict in the first place.

The difference in these two standards is directly relevant to the state's arguments here. As noted, the state relies on Mr. Peterson's purchase of a boat which "he never told anyone about." (RB 307.) In fact, however, the record *as a whole* shows that Peggy O'Donnell and Rosemary Ruiz -- two women who worked at the same warehouse where Mr. Peterson had his office -- *both told police that Laci had been to the warehouse and knew about the boat*. (98 RT 18415-18419.) Although Detective Brocchini excised this information from the police reports provided in discovery, it came out anyway. (57 RT 11195.)

The state relies on the testimony of its fishing expert that Mr. Peterson did not have the right gear to go sturgeon fishing. (RB 308 ["his manufactured alibi was belied by the fact that he did not have the right fishing gear for catching sturgeon . . . ."].) Moreover, the state adds that this was not the right "time of year" to go sturgeon fishing. (RB 308.) The inference the state wants the Court to draw, of course, is that Mr. Peterson made up the story about going sturgeon fishing and he never had any real intent to fish for sturgeon.

In fact, however, the record *as a whole* shows that Mr. Peterson's explanation was supported by evidence that on the evening of December 8, 2002 he visited numerous websites focusing on boating in the Bay Area and sturgeon fishing and performed searches for "'sturgeon', 'fishing', 'tackle', 'San Francisco' and "ten tips for better sturgeon fishing." (75 RT 14399-14404; 75 RT 14367-14368, 14370-14371, 14374-14380, 14395-14396, 14399-14404.) He viewed the State of California Fish and Game website, the 2002 Ocean Sport Fishing Regulations web-page, an archived fishing report which including a report from 2000 that sturgeon fishing was good in December and a Marine Sport Fish Identification web-page on green sturgeon. (75 RT 14395-14399, 15682-15694.) And the very same expert witness on which the state now relies testified that while an *expert* would not try and catch sturgeon with the equipment Mr. Peterson was using, a non-expert could certainly use that equipment to try and catch sturgeon. (75 RT 13789.)

The state relies on Mr. Peterson's conceded affair with Amber Frye under the theory that he wanted to live a life unencumbered by the responsibilities of parenthood. (RB 307-308.) In fact, however, the record *as a whole* not only shows that Amber Frye herself had a young daughter, but the prosecutor -- aware of this fact -- recognized in closing argument that "I don't think [Scott] killed Laci Peterson to go marry Amber Frye . . . ." (109 RT 20209.)

The state relies on Mr. Peterson's "repeated surreptitious trips to the Berkeley Marina in January 2003, driving a different vehicle every time. He never stopped to talk to anyone at the marina. (RB 309.) According to the state, Mr. Peterson knew (1) he had killed Laci and put her body in the bay and (2) police were searching the bay. Accordingly, under the state's theory he took these trips to the marina to "check[] to see if the searchers were looking in the right place." (RB 309.)

In fact, however, the record *as a whole* shows that various members of police surveillance teams testified to other trips Mr. Peterson made after Laci disappeared. One such trip was to the Medeiros reservoir, where police were also searching. (85 RT 16285-16288, 16339.) Like his trips to the Berkeley Marina, Mr. Peterson went in a car. (*Ibid.*) Like his trips to the Berkeley Marina, Mr. Peterson spoke to no-one. (85 RT 16339.)

The state's suggestion that Mr. Peterson drove to the Berkeley Marina because he knew he had put Laci in the bay, and wanted to see if police were searching in the right place, makes utterly no sense in light of his trip to the Medeiros reservoir, where police were also searching. After all, under the state's view, Mr. Peterson would have known there was no body in the Medeiros reservoir. Thus, under the state's theory, there was no reason for him to travel there. Yet his trip to the Medeiros reservoir (where police were searching) was identical to his trips to the Berkeley Marina -- he arrived, spoke to no-one

and drove off soon thereafter. In short, regardless of whether the nefarious inference which the state seeks to draw from the trips to the Berkeley Marina would be appropriate in assessing a sufficiency of the evidence claim, it has no place in a harmless error analysis review conducted in light of the record as a whole.

Considering the record as a whole, admission of the dog scent evidence requires reversal. The prosecutor emphasized the evidence in closing, courts have long recognized the tendency of jurors to want to credit dog scent testimony (*Malgren*, *supra*, 139 Cal.App.3d at p. 241) and the dog scent testimony here supported a critical part of the state's case (that Laci was at the marina). Moreover, the record as a whole shows substantial portions of the state's case were unsupported by any physical or forensic evidence at all, and the circumstantial evidence -- while sufficient to sustain a conviction under the deferential rules of appellate review -- are subject to starkly conflicting interpretations in any harmless error review.

At the end of the day, the Court is confronted with a situation in which the record shows Anderson had been cued as to where to find Laci's scent. Anderson then interpreted for the jury Trimble's body language which confirmed the cue. And the prosecutor then put it into words: "if you believe Trimble, Scott is guilty of capital murder." At risk of restating the obvious, in light of the absolute finality of the death

penalty, there is a "heightened need for reliability" at both the guilt and penalty phase of a capital cases. (*See*, *e.g.*, *Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama* (1980) 447 U.S. 625, 638, n.13.) This Court cannot say with any level of confidence that this unprecedented dog-scent evidence meets that exacting standard. Reversal is required.

## V. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY THAT IT COULD FIND MR. PETERSON GUILTY OF MURDER IF IT FOUND (1) THE DOG TRACKING EVIDENCE WAS CREDIBLE AND (2) SLIGHT CORROBORATING EVIDENCE.

### A. Introduction.

The jury was instructed it could convict Mr. Peterson of murder in either of two distinct ways:

> (1) First the jury was instructed on malice murder. The jury was told it could convict of murder based on an "unlawful kill[ing] . . . with malice aforethought." (19 CT 6092.)
>
> (2) Alternatively, the jury was instructed in accord with CALJIC 2.16 that it could convict of murder based on the dog tracking evidence introduced at trial. Although the jury was told that dog scent evidence alone was "not sufficient to permit an inference that the defendant is guilty of the crime of murder," the court went on to explain that guilt could be inferred from the dog tracking evidence if there was "other evidence that supports the accuracy of the dog tracking evidence" and that this other evidence could be "direct or circumstantial . . . ." (19 CT 6071.)

The court gave specific examples of what could constitute the type of evidence which would justify inferring guilt of murder based on the dog tracking evidence including (1) whether the handler was qualified, (2) whether the dog was adequately

trained, (3) whether the dog had been found reliable, (4) whether the dog had been at a place where "circumstances have shown the victim to have been," (5) whether the scent had become stale and (6) "any other factor that could affect the accuracy of the dog-tracking evidence." (19 CT 6071-672; 111 RT 20549-20550.)

Defense counsel objected to the instruction. (108 RT 20148.) In his opening brief, Mr. Peterson contended that providing the jury with a "dog scent plus" theory of murder required reversal. More specifically, Mr. Peterson contended that the trial court erred in instructing the jury it could convict of murder by relying on dog scent evidence with slight corroborating evidence. (AOB 241-242.) Because the jury rendered a general verdict of guilt, this error required reversal for three separate reasons: (1) it gave the jury a theory of murder that did not exist under state law, (2) it constituted an improper evidentiary presumption as to the proper elements of murder and (3) it improperly lightened the state's burden of proof. (AOB 242-254.)

The state disagrees. The state first argues briefly that despite defense counsel's objection, the claim is waived. (RB 319.) Turning to the merits, the state argues there was no error at all because (1) the court's instruction on dog tracking "did not give the jury license to convict based solely on dog trailing evidence" but required "corroborating evidence" (RB 320-321) and (2) in any event, the jury was given alternative instructions

on malice-murder on which it could have relied. (RB 322). Turning to prejudice the state argues (1) the instruction did not give the jury a theory of murder at all (RB 321) and (2) although the instruction created a permissive evidentiary presumption, that was warranted "in light of the proven facts before the jury . . . ." (RB 325; *see* RB 324-328.) The state does not dispute Mr. Peterson's separate contention that the instruction improperly lightened the state's burden of proof. (RB 316-330.)

B. The Claim Is Properly Before The Court.

The state recognizes that defense counsel objected to this instruction. (RB 319.) The state is correct. (108 RT 20148.) But according to the state, this was a "pro forma" objection simply for the record which is not enough. (RB 319.) The state reaches this rather jaundiced conclusion about defense counsel's objection because -- in the state's view -- defense counsel had proposed an instruction which "approved the language which appellant now finds objectionable." (RB 319.)

The state's interpretation of the instruction requested by defense counsel is hard to understand. The instruction which the court gave told jurors they could convict of murder based on the "dog tracking of the victim" if the state had presented any "other evidence

that *support[ed] the accuracy of the dog tracking evidence*." (19 CT 6071.) It then told them that this "other evidence" could be either "direct or circumstantial." (19 CT 6071.)

The instruction requested by the defense looks nothing like this at all. Defense counsel requested an instruction that would have told jurors they could convict of murder based on the dog tracking evidence only if the state had presented "*substantial* evidence that supports the accuracy *of the identification of the defendant as the perpetrator of the crime of murder*." (Supp. CT Exhibits Transcript at p. 64.)

In other words, the instruction given to jurors permitted conviction if there was any evidence supporting the accuracy of Anderson's testimony that Trimble alerted, showing Laci had been at the marina. The focus of the corroborating evidence was solely on the accuracy of Trimble's alert. But the defense instruction permitted conviction only if there was *substantial* evidence showing that defendant *was properly identified as Laci's killer*. The focus of the corroborating evidence was not on Trimble's alert at all, but on the state's remaining evidence implicating defendant.

As Mr. Peterson explained in his opening brief, the precise vice of the actual instruction given by the trial court is that it permitted the jury to convict without

considering the state's remaining evidence. (AOB 246.) That was the exact vice defense counsel was trying to cure in the instruction he requested. The state's argument to the contrary ignores the language of the instruction the defense actually requested.

In any event, as the state concedes, pursuant to Penal Code section 1259 no objection is even necessary to preserve instructional errors which impact substantial rights. (RB 319.) For this reason too, then, the issue is properly before this Court.

### C. The Trial Court's Provision Of A Theory Of Murder Which Does Not Exist Under State Law Was Federal Constitutional Error.

As given here, the dog-tracking instruction explicitly permitted the jury to convict Mr. Peterson of murder based on the fact that (1) Trimble alerted at the Berkeley Marina and (2) there was either direct or circumstantial evidence which "supported the accuracy" of that alert. As explained in the opening brief, this is a theory of murder which does not exist under state law. (AOB 241-242.)

The state disagrees. The state argues that this instruction did not permit "the jury to convict based solely on the dog trailing evidence." (RB 321.)

The state is entirely correct. But its argument misses the entire point of Mr. Peterson's argument. The instruction permitted the jury to convict based on (1) the dog trailing evidence *plus* (2) any direct or circumstantial evidence "that supports the accuracy of the dog tracking evidence." (19 CT 6071.) This "dog tracking plus" theory of culpability for murder simply does not exist under state law. Instead, under state law, murder requires the state to prove either (1) an unlawful killing with malice or (2) felony murder. (Penal Code sections 187, 189.)

The state notes that the jury was instructed on malice murder. (RB 322.) Again the state is correct. But as Mr. Peterson noted in his opening brief, all this means is that the jury was given two theories of murder -- one which was correct (malice murder) and one which was not (dog tracking plus). The provision of a theory of culpability that does not exist under state law was federal constitutional error. (AOB 242.)

D. The Error Requires Reversal.

In his opening brief, Mr. Peterson contended the trial court's instructional error required reversal for three reasons. First, reversal was required because the jury had been given an improper theory of culpability and, because the jury rendered a general verdict

of guilt, the state could not prove the jury relied on a proper theory of culpability. (AOB 243-244.) Second, the instruction created an improper permissive instruction which allowed the jury to infer all elements of a murder charge from (1) proof that Trimble alerted at the marina and (2) some evidence supporting the accuracy of that alert. (AOB 244-251.) Third, the instruction undercut the burden of proof because it permitted the jury to find guilty beyond a reasonable doubt based on (1) proof of a fact which is insufficient for such proof (the dog tracking evidence alone) and (2) some other corroborating evidence. (AOB 251-254.)

The state does not address (or dispute) the third of these contentions. (RB 316-330.) Thus, there is no reply to be made on this point.

The state does, however, dispute Mr. Peterson's initial two harmless error arguments. As to the improper theory rationale, the state cites this Court's decision in *People v. Rogers* (2013) 57 Cal.4th 296. (RB 329.) In *Rogers*, the defendant argued that a similar instructional error resulted in the state presenting "its case to the jury on alternate theories, some of which are legally correct and other legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing verdict of guilt rested." (57 Cal.4th at p. 336.) This Court held that the lenient *Watson* test for prejudice applied. (*Ibid*.)

In this respect, however, *Rogers* is not entirely consistent with other cases this Court has decided both before and after *Rogers*. Prior to *Rogers* this Court had long held that "[i]n this situation, to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory . . . ." (*People v. Chun* (2009) 45 Cal.4th 1172, 1203. *Accord People v. Green* (1980) 27 Cal.3d 1, 69-71; *People v. Smith* (1984) 35 Cal.3d 798, 808; *People v. Morris* (1988) 46 Cal.3d 1, 24.) And after *Rogers*, the Court returned to this same approach. (*See People v. Chiu* (2014) 59 Cal.4th 155, 167 ["When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. . . . Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory . . . ."].)

The state does not dispute that if this traditional test for prejudice is applied here, reversal is required. It is impossible to determine from the jury's general verdict if it relied on the erroneous incorrect legal theory, and because nothing in the record establishes beyond a reasonable doubt that the jury relied on the correct theory, reversal is required.

With respect to the permissive presumption theory of prejudice, and as noted, the

state concedes that the dog tracking instruction constituted a permissive presumption. (RB 324.) The state argues, however, that this was entirely proper. (RB 324.) According to the state, it was entirely proper for the jury to infer that Mr. Peterson murdered his wife from (1) the dog tracking evidence and (2) any other evidence -- some direct or circumstantial -- which supported that evidence. (RB 325.)

Because Mr. Peterson has already addressed this issue in his opening brief, there is no need to dwell on the argument. As the state concedes, permissive presumptions are constitutional only if can be said "with substantial assurance" that the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend." (*Ulster County v. Allen* (1979) 442 U.S. 140, 166, n. 28.) A permissive presumption violates Due Process whenever "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin* (1985) 471 U.S. 307, 314-315.)

Here, the jury was permitted to infer that Mr. Peterson unlawfully killed his wife with malice aforethought. The jury was permitted to infer this solely from (1) Trimble's alert and (2) any evidence -- direct or circumstantial -- supporting that alert. Because the "suggested conclusion" -- that Mr. Peterson killed unlawfully and with malice -- is not more likely than not to flow from "dog evidence plus" -- the presumption is

unconstitutional. And because the state cannot prove that the jury did not rely on the presumption, reversal is required. (*Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316.)

## VI. THE COURT VIOLATED THE CONSTITUTION IN GIVING A ONE-SIDED INSTRUCTION ON HOW THE JURY COULD USE THE DOG SCENT EVIDENCE PRESENTED AT TRIAL.

There were two dog scent searches performed at the Berkeley Marina. Ron Seitz had his dog search the boat ramp; the dog showed no indication at all of an alert. (105 RT 19605-19613.) As discussed above, Eloise Anderson had her dog search the same area; according to Anderson, her dog alerted to Laci's scent. (84 RT 16085.)[19]

The trial court here singled out the state's *inculpatory* dog-scent evidence and told the jury "guilt could be inferred" from this evidence so long as there was some "other evidence that supports the accuracy of the dog tracking evidence." (19 CT 6008.) The trial court never instructed the jury that it could rely on the *exculpatory* dog-scent evidence to acquit. In his opening brief, Mr. Peterson contended that by singling out the state's inculpatory dog-scent evidence -- and telling the jury it could rely on that evidence to convict -- but failing to give a balanced instruction telling the jury it could acquit based on the exculpatory dog-scent evidence, the court violated the Supreme Court's explicit

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[19] Although it is not entirely clear, the state appears to take varying positions as to whether the two searches covered the same area. At one point, the state seems to contend that the two dogs searched different areas. (RB 286.) But the state also (and properly) concedes that "Anderson worked Trimble in the same area [as Seitz worked T.J.] . . . and Trimble had alerted." (RB 128.)

requirement of instructional equality between the state and the defense articulated nearly 40 years ago in *Cool v. United States* (1972) 409 U.S. 100. (AOB 255-265.)

The state disagrees for three reasons. First, the state argues that defense counsel forfeited the claim. (RB 331.) The argument need not long detain the Court. As discussed above, defense counsel specifically objected to the instruction at issue. (108 RT 20148.) No more was required to preserve this issue for appeal. In addition, because the claim here involves an instructional error implicating Mr. Peterson's substantial rights, the issue would have been preserved without any objection at all. (*See* Penal Code section 1259 ["The appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].)

Turning to the merits, the state argues *Cool* does not control. In light of the issue actually presented here, the state's discussion of *Cool v. United States* is curiously incomplete.

In *Cool* the defendant was charged with possessing counterfeit bills. At trial, an accomplice provided testimony which supported the theories of both the defense and the

state. (*See Cool v. United States*, *supra*, 409 U.S. at p. 105 [Rehnquist, J., dissenting]["Much of [the accomplice's] testimony tended to exculpate petitioner, but there were significant aspects of it that did not."].)

Ultimately, the confusion in the state's analysis may result from the fact that the Supreme Court in *Cool* identified two completely distinct errors committed by the trial court in its instructions to the jury. First, the trial court instructed the jury it could rely on the accomplice's testimony to convict, but failed to also tell the jury it could rely on this evidence to acquit. (409 U.S. at p. 103, n.4.) The Supreme Court found that this "instruction was . . . fundamentally unfair in that it told the jury it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis." (*Ibid*.) This error had nothing at all to do with the state's burden of proof; "*[e]ven had there been no other error, the conviction would have to be reversed on the basis of this instruction alone*." (*Ibid*., emphasis added)

There was a second error in *Cool*. The trial court also told the jury that it could consider the accomplice testimony only if it was proved beyond a reasonable doubt. Because much of the accomplice's testimony was exculpatory, the Court held that this instruction placed an unfair impediment to the jury's consideration of defense evidence and undercut the state's burden of proof beyond a reasonable doubt. (409 U.S. at p. 102-

103.)

In its discussion of *Cool*, the state discusses the Supreme Court's holding on the burden of proof error and describes it as a "blatant constitutional flaw." (RB 332.) Focusing on this "blatant constitutional flaw," the state argues that the "overriding concern of the high court in *Cool* was the improper use of the 'beyond a reasonable doubt' language in the instruction." (RB 332-333.) Focusing on the burden of proof error in Cool, the state further notes that the instruction here "does not remotely resemble the blatant constitutional flaw" of the instruction in *Cool* and argues the instruction here did not tell the jury that defense favorable testimony "could not be considered unless proven beyond a reasonable doubt." (RB 332-333.)

The state is entirely correct. But the flaw in respondent's approach, of course, is its exclusive focus on the burden of proof issue in *Cool*. Mr. Peterson quite agrees that the burden of proof issue in *Cool* has no application to this case at all. But it should be just as clear that Mr. Peterson never relied on the burden of proof holding from *Cool*, or sought to apply it here. Instead, the portion of *Cool* that controls this case is the Court's separate holding that singling out a certain type of evidence on which both sides relied -- in that case accomplice testimony -- and telling the jury that this evidence can be used to convict was "fundamentally unfair" and required reversal "[e]ven had there been no

other error . . . ."

Here, the state concedes that the defense relied on dog tracking evidence. (RB 306. See 105 RT 19605-19613.) Like *Cool*, then, both sides here relied on the same type of evidence -- dog tracking evidence. Like *Cool,* the trial court singled out this evidence and told the jury it could rely on it to convict, but failed to tell the jury it could also rely on the evidence to acquit. Although the state focuses on the burden of proof error in *Cool* -- which has no application to this case -- the fact of the matter is that the error here is exactly the same error as occurred in *Cool*.[20]

Alternatively, the state argues any error was harmless. Predictably, the parties have very different views of the reliability of the two dog searches, the two dog handlers and the two dogs. (*Compare* AOB 262-264 with RB 335-336.) Yet again, because Mr. Peterson has anticipated much of the state's harmless error argument in his opening brief,

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[20] The state adds that "the instruction here did not bar the jury from considering other dog trailing evidence as being indicative of appellant's innocence (i.e. testimony of dog handler Ron Seitz)" and counsel was free to argue the point. (RB 333.) This is true, but does not distinguish the case at all from *Cool*. The instruction in *Cool* did not bar the jury from considering the accomplice's testimony either, nor was counsel barred from making any such argument there.

there is no need to respond in detail. (AOB 261-265.)[21]

In making its harmless error argument the state notes, as it has elsewhere in its brief, that the bodies "washed ashore not far from where appellant said he was fishing." (RB 335.) To its credit, the state recognizes that because of the publicity which attended the case "the rest of humanity knew appellant was at the marina on Christmas Eve." (RB 335.) This concession was certainly warranted; at trial, prosecution witness Detective Mike Hermosa admitted that by January 2003 "everybody knew" Mr. Peterson said he had been at the Berkeley Marina on Christmas eve. (69 RT 13406.)

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[21] The state relies on Trimble's alert as testified to by Eloise Anderson. The state recognizes that much of Anderson's experience was in dog obedience school, and notes that she had 10 years experience volunteering with CARDA prior to the searches in this case. (8 RT 1489; RB 273.) The state fails to note that Anderson was not entirely forthright about Trimble's training history. (8 RT 1545-1546; 85 RT 16116-16119.) Nor was Anderson entirely forthright in her testimony about whether there was an alert at the warehouse. (*Compare* 8 RT 1599 [Anderson admits that in her contemporaneous written report she recorded "no alerts" *with* 8 RT 1533 [Anderson changes her testimony at a pretrial hearing and now says that there was an alert].) As to Trimble -- and as discussed in greater detail in Argument IV, *supra* -- the record showed his success rate in closed-container subject searches like the one in this case was 33%. (8 RT 1488-1508, 1541-1542, 1551-1553, 1562; 85 RT 16133-16134, 16146.)

In contrast, the defense relies on TJ's failure to alert as testified to by dog handler Ron Seitz. Seitz had worked with the Alameda Sheriff's Office Search and Rescue unit for 28 years. (AOB 263.) In fact, at the time of trial Mr. Seitz was head of that unit. (AOB 263.) As to TJ, his success rate was 70-80%. (105 RT 19640.) In contrast to Anderson, Seitz performed a detailed inquiry before selecting an item for TJ to get Laci's scent, and he used her bedroom slipper in order to "minimize the opportunity for cross-contamination." (105 RT 19607-19608.)

In dramatic fashion, however, the state's appellate lawyers argue that any suggestion that someone else could have killed Laci "was rendered incredible by . . . appellant's numerous trips to the marina. In different vehicles each time. And, never speaking to anyone." (RB 335.) The inference the state wants the Court to draw from this seemingly foreboding series of facts is obvious. According to the state, Mr. Peterson knew he had killed Laci and put her body in the bay. He knew police were searching the bay. The prosecutor argued at trial that this evidence showed Mr. Peterson was checking to see if the searchers were looking in the right place. (109 RT 20271.) In the state's view, of course, this makes the trips to the marina convincing evidence of guilt.

The state made this same argument in contending that admission of the dog scent evidence was harmless. (RB 309.) As noted in the reply to that argument, however, the state's position ignores the record as a whole.

It is true police were searching the marina. It is true Mr. Peterson went to the marina. If this is all there was, the state would have a strong argument.

But this is not all there was. In fact, as noted above, police witnesses testified to other trips Mr. Peterson made after Laci disappeared, including a trip to the Medeiros

reservoir, where police were also searching. (85 RT 16285-16288, 16339.) Like his trips to the Berkeley Marina he went in a vehicle and spoke to no-one. (*Ibid*.) These other trips to where police were searching undercuts any suggestion that Mr. Peterson drove to the marina because he knew he had put Laci in the bay and wanted to see if police were searching in the right place. If the state's theory was correct, Mr. Peterson would also have known there was no body in the Medeiros reservoir, yet he drove there as well when he learned police were searching there. The state offers no explanation at all for this gaping hole in its theory.

As discussed in some detail above, the sinister conclusion which the state seeks to draw in aid of its harmless error argument simply does not consider the record as a whole. But as also discussed above, it is the record as a whole which must be considered in any harmless error review. (*Yates v. Evatt*, *supra*, 500 U.S. at p. 409; *Rose v. Clark*, *supra*, 478 U.S. at p. 583; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 681; *People v. Mil*, *supra*, 53 Cal.4th at pp. 417-418; *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 1013.) Considering the instructional error here in light of the record as a whole requires that the conviction be reversed.

## VII. THE TRIAL COURT VIOLATED BOTH STATE AND FEDERAL LAW BY ADMITTING EXPERT TESTIMONY THAT CONNER WAS PLACED IN THE WATER WHERE MR. PETERSON HAD BEEN FISHING.

The state's theory was that Mr. Peterson put Laci Peterson into the bay near where he was fishing, and she washed ashore in April of 2003. To establish a connection between Mr. Peterson's fishing trip, and where the bodies of Laci and Conner washed ashore, and over defense objection, the state presented testimony from hydrologist Dr. Ralph Cheng. Dr. Cheng testified that based on where Conner was ultimately found, Conner's body had been anchored to the bay bottom in an area 500-1000 yards southwest of Brooks Island. That was the approximate area in which Mr. Peterson said he was fishing on December 24. (55 RT 10725-10728.)

To his credit, Dr. Cheng admitted that he was not an expert in the movement of bodies in water. (101 RT 18925.) He admitted that he had never even done a single study in this area. (101 RT 18926.) Nevertheless, over defense objection the trial court admitted Dr. Cheng's testimony and, in closing argument, the prosecutor told the jury that if Dr. Cheng was believed, "then that man's a murderer. It's as simple as that." (100 RT 18855; 109 RT 20279-20280.)

In his opening brief Mr. Peterson contended that admission of this evidence

violated state law because the state -- as the proponent of this evidence -- never carried its burden of proving Dr. Cheng's testimony was either (1) based on a well-accepted scientific technique that was not new (and therefore not subject to the foundational requirements for new scientific evidence of *People v. Kelly*, *supra*, 17 Cal.3d 24); or (2) a new technique that complied with the foundational requirements set forth in *Kelly*. (AOB 278-284.) And admission of the evidence violated federal law because it was too unreliable to admit in a capital case under federal law. (AOB 284-285.) Admission of this evidence required reversal because the case was close, the nature of the expert testimony evidence was highly incriminating, and the prosecutor placed substantial reliance on that testimony in urging the jurors to convict of murder. (AOB 285-296.)

The state disagrees for three main reasons. First, the state argues that this claim too is waived. (RB 337-338.) Second, the state addresses the merits and makes a two part argument that (1) no *Kelly* hearing was required because Dr. Cheng's testimony simply involved "the operation of the tides, currents, and wind as they occurred in San Francisco Bay" and (2) in any event, although there was no *Kelly* hearing in the case, the state nevertheless met *Kelly*'s three-pronged test. (RB 345-346, 351-353.) Third, the state argues that any error was harmless. (RB 354-358.)

Each argument will be addressed in turn. As discussed below, prior to Dr.

Cheng's testimony, defense counsel specifically requested a *Kelly* hearing. That request was denied. No more was required in order to preserve this issue for appeal. On the merits, while the state is correct that basic testimony about tides would not have to meet the *Kelly* test, the import of Dr. Cheng's testimony had little to do with tides -- it had to do with the movement of bodies in water. As to this subject, Dr. Cheng himself admitted he was not an expert and had done no research at all. And because there was no *Kelly* hearing about the movement of bodies in water, the state did not establish *any* of *Kelly*'s three prongs. Finally admission of this evidence cannot be deemed harmless under any standard given the importance of this evidence to the state's case.

### A. The Issue Is Properly Before The Court.

At trial, Dr. Cheng offered an opinion that based on where Conner Peterson washed ashore, he had been placed in the bay near where Scott Peterson told police he was fishing that day. Defense counsel asked the court to hold a *Kelly* hearing prior to admitting Dr. Cheng's testimony. (100 RT 18853.) The court refused. (100 RT 18853.) In his opening brief, Mr. Peterson contended that the trial court erred in refusing to hold a *Kelly* hearing. (AOB 278-283.)

The state disagrees. The state concedes that "defense counsel stated that a *Kelly* . . . hearing was necessary." (RB 339.) The state concedes that the trial court "disagreed" and refused to hold such a hearing. (RB 339.) Nevertheless, the state argues the issue is not preserved for review. The state bases this argument on defense counsel's cross-examination of Detective Hendee several months earlier. (RB 337-338.)

Detective Hendee had been called by the state as a witness on July 13, 2004. (64 RT 12471.) His direct examination by the state covered a great many subjects, including searches performed by police in San Francisco Bay to locate Laci. (64 RT 12625.) Under questioning by the prosecutor, Detective Hendee testified in great detail to the many searches police performed in the bay. (64 RT 12625-12646, 12709-12711.) During this testimony, the court overruled defense counsel's numerous objections based on inadequate foundation. (64 RT 12633, 12634.)

After the direct examination was concluded, defense counsel cross-examined Detective Hendee on the searches which the prosecutor had been permitted to cover on direct examination. (65 RT 12730-12803.) Counsel then asked several questions about Detective Hendee's consultation with Dr. Cheng, eliciting that (1) Dr. Cheng had been given information as to where Laci and Conner were found on shore and (2) based on that information, Dr. Cheng provided information as to where police could search for anchors

and body parts in the water. (66 RT 12810-12819.) The rest of the cross-examination was devoted to establishing that the underwater searches uncovered no relevant evidence at all. (66 RT 12819-12845.) At no point did defense counsel elicit any testimony from Detective Hendee about Dr. Cheng's specific prediction as to where the bodies were placed in the water. (66 RT 12809-12845.)

The state argues that because defense counsel cross-examined Detective Hendee about his direct examination testimony, he waived any objection to admission of Dr. Cheng's later testimony as to where the bodies were put in the water. The state argues that it would be "anomalous" to permit defense counsel to "introduce the opposing party's evidence for its own benefit" and then later move to exclude that same evidence based on inadequate foundation. (RB 338.) Under the theory now put forth by the state's appellate lawyers, in order for defense counsel to preserve an objection to Dr. Cheng's testimony as to where Conner was placed in the Bay, counsel had to entirely forego cross-examining Detective Hendee on the subject matter covered by the prosecution in direct examination, or at least wait more than three months to do it.

It is worth noting that in discussing Dr. Cheng's testimony, the trial prosecutor suggested that "counsel's already elicited a lot of that core information through Detective Hendee." (100 RT 18854.) Defense counsel immediately corrected him, referring to Dr.

Cheng's specific "observations about Conner" and noting that the prosecutor's suggestion the evidence had already come in through Detective Hendee was "revisionist history." (100 RT 18854-18855.) As defense counsel noted, "I don't believe that there has ever been admitted into evidence the proposition which they are going to do . . . ." (100 RT 18855.)

In short, defense counsel did not waive his objections to Dr. Cheng's testimony as to where Conner was put in the Bay. As defense counsel pointed out at trial, and contrary to the state's argument, at no point in his cross-examination of Hendee did defense counsel elicit this information. That was the testimony to which defense counsel later objected. Put simply, the state has mixed apples and oranges.

The real anomaly here would be to permit the prosecution to call Detective Hendee in July, yet effectively preclude defense counsel from cross-examining him (on pain of waiver) until after the state called Dr. Cheng *more than three months later*. The consequence of accepting such a theory is obvious: the prosecution would simply put their experts on last thereby (1) precluding the defense from any kind of timely and effective cross-examination and (2) requiring the defense to call back witnesses in order to impeach them. And in cases like this, the cross-examination would have to wait until many months had passed, and the witnesses' testimony was no longer fresh in the jury's

mind. Nothing counsels in favor of such a system.

Defense counsel specifically objected to Dr. Cheng's testimony and asked for a *Kelly* hearing. Perhaps recognizing the limited nature of his cross-examination of Hendee, the prosecutor did not argue -- and the trial court did not find -- any kind of forfeiture based on that cross-examination. The issue is properly before the Court.[22]

### B. Because Dr. Cheng Was Not Testifying About The General Movement Of Tides, But was Testifying Specifically About How Bodies Move In Water -- An Area In Which He Admitted He Was Not An Expert -- Admission Of His Testimony Without A *Kelly* Hearing Was Error.

Dr. Cheng admitted that he had never studied the movement of bodies or objects in water. (101 RT 18926.) None of his work involved studying the movement of bodies in water generally or in the San Francisco Bay specifically. (100 RT 18865, 18938.) When specifically asked about the movement of Laci's body in water, he admitted that he was "not an expert in that area . . . ." (101 RT 18925.) Dr. Cheng also admitted that "I don't

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[22] In a separate argument, the state argues that even if the issue is generally preserved for review, the federal components of this argument are waived because counsel did not mention the federal constitution when objecting to the evidence. (RB 354.) For the same reasons discussed above in connection with the same argument made as to the dog scent evidence, however, the state's position is without merit. (*See* Argument IV-C, *supra*.)

know how the body is behaving in water." (*Ibid*.) Nevertheless, the trial court admitted Dr. Cheng's testimony about where Conner and Laci were put in the Bay and how Conner's body moved in water to get where it washed ashore. (101 RT 18904, 18909-18910, 18914.)

As noted above, in his opening brief Mr. Peterson contended that Dr. Cheng's testimony should not have been admitted because the state had not carried its burden of proving that testimony was either (1) based on a well-accepted scientific technique that was not new (and therefore not subject to the foundational requirements for new scientific evidence of *People v. Kelly*, *supra*, 17 Cal.3d 24); or (2) a new technique that complied with the foundational requirements set forth in *Kelly*. (AOB 278-284.) The state disagrees on both counts. According to the state, Dr. Cheng's testimony did not involve any new scientific technique and so was not subject to the *Kelly* test because it involved "the operation of the tides, currents and wind, as they occurred in San Francisco Bay." (RB 345.) The state's appellate lawyers assure the Court that "truly, the gravamen of Dr. Cheng's testimony was to explain to the jury how the waters in San Francisco Bay acted and how the weather influenced the movement of waters in the Bay." (RB 348.)

Mr. Peterson will start with a point of agreement. If indeed all Dr. Cheng had testified to was "how the waters in San Francisco Bay acted" and how weather influenced

the water there would have been no need for a *Kelly* hearing. But as every party actually in court that day knew, Dr. Cheng was *not* called to provide general testimony about "how the waters in San Francisco Bay acted." He was called to -- and did -- testify about the movement of Conner's body in water. (101 RT 18904, 18909-18910, 18914.) And that is exactly how the prosecutor used his testimony in closing argument. (109 RT 20280-20281.)

Indeed, the state itself recognizes this, recognizing that what Dr. Cheng really did was "create[] [a] progressive vector diagram showing the path of Conner's body to the shore . . . ." (RB 353.) In short, testimony about the general movement of tides -- which is certainly not subject to *Kelly* -- is a very different kettle of fish from specific testimony about how bodies move in water. The state's argument that Dr. Cheng's testimony was not new, but was based on a well-accepted scientific technique, must be rejected.

In making its contrary argument the state cites *People v. Roehler* (1985) 167 Cal.App.3d 353. (RB 347.) The state argues that *Roehler* proves that Dr. Cheng's testimony about the "physics of the movement of objects in water" was not a "new and novel scientific technique." (RB 347.) According to the state, *Roehler* establishes this point because the state introduced the same type of testimony in that case from its expert, Dr. Scott Hickman. (RB 347.)

*Roehler* does nothing of the sort. There, defendant was convicted of murder in the drowning deaths of his wife and stepson after their small boat capsized at sea. The defense theory was that the two had drowned in a boating accident. Given this defense, the state sought to prove that a head injury the stepson had received could not have been caused by the boy popping to the surface and hitting his head on the capsized boat. The state retained Dr. Hickman, a fluid dynamics expert to testify as an expert. (167 Cal.App.3d at p. 369.)

*But in stark contrast to this case, Dr. Hickman did not even purport to opine on how the victim's body moved in the water*. Instead, he did a formal experiment with a boy identical in size and weight to the deceased. (167 Cal.App.3d at p. 369.) Dr. Hickman determined the actual velocity the stepson would move in popping to the surface. (*Ibid*.) Without objection, he testified to the results of his experiment in court. (*Ibid*.)

*Roehler* does not support the state's position here. Unlike Dr. Cheng, Dr. Hickman did *not* simply offer an opinion as to how a body could move in water. Instead, he performed a tightly controlled experiment and testified -- without objection -- as to the results of that experiment. Indeed, if anything, Dr. Hickman's initial decision to run an experiment before testifying about how a particular body would actually move in water, rather than simply rely on general knowledge of tides and fluid dynamics, suggests that

the very different approach taken by Dr. Cheng here was *not* consistent with the approach taken by other fluid dynamics experts.

Alternatively, the state argues that it met the foundational requirements this Court set forth in *Kelly*. (RB 349-354.) The state's analysis reflects a fundamental confusion about *Kelly*.

*Kelly* sets forth three criteria which the state -- as the proponent of the evidence -- has the burden of establishing. Under *Kelly*, evidence obtained through a new scientific technique may be admitted only after the proponent of the evidence proves (1) the scientific technique is generally accepted as reliable in the relevant scientific community, (2) the witness testifying about the technique and its application is a properly qualified expert on the subject and (3) the person performing the test in the particular case used correct scientific procedures. (17 Cal.3d at p. 30.)

The state argues that it met the first prong of *Kelly* because the "speciality of fluid mechanics or hydraulics (movement of fluids)" is "not new or novel." (RB 351.) This misapprehends the first prong inquiry under *Kelly*. If Dr. Cheng's testimony truly was about the movement of fluids, it would not be subject to the *Kelly* test in the first instance.

The state's argument in connection with *Kelly*'s first prong is simply a restatement of its argument that *Kelly* should not apply. But for the same reasons discussed above -- because Dr. Cheng's testimony was *not* about the movement of water but was about the very different subject of the movement of bodies in water -- the argument should be rejected here as well.

Turning to the second prong, the state argues that Dr. Cheng's credentials were "unimpeachable." (RB 352.) The state is correct, and had Dr. Cheng testified about the movement of water, there is no doubt his "unimpeachable" opinion would be admissible. But the state itself concedes that "the primary focus of Dr. Cheng's research . . . was studying the 'hydraulics' or physical processes of how water moved in San Francisco Bay." (RB 340.) The state itself concedes that Dr. Cheng's research "did not include the specific study of the movement of human bodies in the Bay." (RB 344.)

The state seeks to mitigate the force of these concessions by observing in several places that "Dr. Cheng's research involved the use of drifters to monitor the workings of the tides and currents." (RB 353. *See* RB 349.) As the state notes -- albeit only in passing -- *the drifters on which the state now places so much weight were "density neutral."* (RB 353.) The state never explains why monitoring a "density neutral" drifter used to track the flow of water would qualify *anyone* to testify as an expert about the

movement of actual bodies that were *not* density neutral. And perhaps more importantly, it is obvious from Dr. Cheng's frank admissions about his lack of expertise that he himself did not believe his use of density neutral drifters qualified him as an expert in the very different area involving the movement of bodies in water.

To the contrary, at trial Dr. Cheng candidly conceded that he had not studied, was not an expert in and knew nothing about how bodies move in water. (101 RT 18926 [Dr. Cheng admits he has never done a study in San Francisco Bay involving the movement of bodies or objects in water]; 100 RT 18865 and 18938 [Dr. Cheng admits that none of his work involved studying the movement of bodies in water generally or the San Francisco Bay specifically]; 101 RT 18925 [Dr. Cheng admits he is "not an expert in that area" and does not "know how the body is behaving in water."].) In light of Dr. Cheng's own testimony, and the state's concessions about the limits of his experience and research, the record shows Dr. Cheng was not properly qualified to offer opinions on how bodies move in water.

The state then turns to the third prong of *Kelly* which requires evidence that the person performing the test in the particular case used correct scientific procedures. (17 Cal.3d at p. 30.) The state argues that "there was no evidence adduced to suggest that the procedures by which Dr. Cheng created the progressive vector diagram showing the path

of Conner's body to the shore were incorrect or otherwise suspect." (RB 353.) The state's factual observation is entirely correct.

But contrary to the state's implicit legal assumption, it was not the defendant's burden to prove Dr. Cheng used improper scientific procedures. As the proponent of the evidence, it was the state's burden to prove it admissible. (*People v. Ashmus* (1991) 54 Cal.3d 932, 970; *People v. Morris* (1991) 53 Cal.3d 152, 206.) This rule applies to the *Kelly* test as well: "the proponent [of the evidence must] show that 'correct scientific procedures were used in the particular case.'" (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155.) Thus, it was the state's burden to prove that "correct scientific procedures were used in the particular case." And here, the state presented no other testimony at all to suggest that the procedures on which Dr. Cheng relied -- who admitted he had done no research and was not an expert in the field -- were correct.

The prosecution did not establish any of *Kelly*'s three prongs. The state's contrary argument should be rejected.

### C. The Improper Admission Of Dr. Cheng's Expert Testimony Requires Reversal.

In his opening brief Mr. Peterson contended that admission of Dr. Cheng's expert testimony was prejudicial. (AOB 294-296.) The state disagrees, arguing that Dr. Cheng's testimony was "merely corroborative" of other facts and was "largely inconsequential." (RB 354, 355.) The state's prejudice argument tracks its prejudice argument in connection with the dog scent evidence, discussed in Argument IV-D, above.

As it did with the dog scent evidence, the state takes a mathematical approach to harmless error noting that (1) in relying on Dr. Cheng's evidence the prosecutor only used 10 words (RB 355) and (2) the defense only discussed this evidence in 44 words (RB 355.) As it did with the dog scent evidence, the state argues there was no prejudice because the defense "worked to negate" Dr. Cheng's testimony through cross-examination. (RB 355.) Third, any error was harmless because of the "surfeit of evidence proving appellant's guilt." (RB 356.)

Because Mr. Peterson has already briefed prejudice in connection with this issue in his opening brief, and because he has already replied on prejudice in connection with the

dog scent issue, his reply here will be short. The rather formulaic "mathematical model" the state proposes ignores the force of Dr. Cheng's expert testimony. If the jury accepted Dr. Cheng's testimony -- that Conner was put in the Bay where Mr. Peterson said he was fishing -- then the prosecutor's argument was extremely powerful: "that man's a murderer. It's as simple as that." The brevity of the prosecutor's argument testifies to the strength of Dr. Cheng's testimony, not its weakness. Yet again, the state never explains why the prosecutor would have to go on and on and on about this evidence in order for admission of the evidence to have had a prejudicial impact on the jury. As noted above, jurors do not need to be spoon fed for there to be prejudice. (*See People v. Guiuan*, *supra*, 18 Cal.4th at p. 578 [Brown, J., concurring and dissenting].)

And while it is true that defense counsel did his best to undercut this expert testimony, counsel's attempt has no real place in the prejudice calculus. The prosecutor told jurors this evidence meant that Mr. Peterson was guilty "as simple as that." The prosecutor's reliance on this evidence shows its importance to the state's case "and so presumably [to] the jury." (*See People v. Powell* (1967) 67 Cal.2d 32, 55-57; *People v. Cruz* (1964) 61 Cal.2d 861, 868. *Accord United States v. Kojoyan* (9th Cir. 1996) 8 F.3d 1315, 1318.) These cases all make clear that the prosecution may not tell a jury that certain evidence is key, then tell a reviewing court that that evidence was of no importance. Yet that is exactly what the state seeks to do here.

Finally, as it did in connection with the dog scent evidence, the state argues any error was harmless because of the remaining evidence of guilt. (RB 356.) There is no need to repeat the reply already made to this argument. The circumstantial evidence on which the state relies for this argument has been discussed above in Argument IV-D.

Suffice it to say here that the trial prosecutor's themselves conceded they could not prove how, when or where the crime was committed. No physical or forensic evidence supported the state's theory that Scott killed Laci at the Peterson home. (48 RT 9444-9448; 50 RT 9832; 57 RT 11164-11165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) No physical or forensic evidence supported the state's theory that Scott then transported Laci in his truck. (67 RT 12946-12952, 12959-12960, 12963-12965; 90 RT 17149-17156.) No physical or forensic evidence supported the state's theory that Scott then wrapped the body in a tarp. (66 RT 12876.) The state never found any anchors to support its theory that Scott had made anchors to weigh down the body. (64 RT 12644-12645; 65 RT 12709-12710, 12779, 12786-12787; 66 RT 12813-12815, 12819-12820, 12837.)

If this is a "surfeit of evidence," then this phrase too has lost all meaning. Reversal is required.

## VIII. THE TRIAL COURT ERRED IN EXCLUDING CRITICAL DEFENSE EVIDENCE, REFUSING TO ALLOW DEFENDANT TO TEST EVIDENCE ABSENT THE PRESENCE OF STATE PROSECUTORS AND REFUSING TO GRANT A MISTRIAL AFTER THE JURY PERFORMED AN EXPERIMENT DURING DELIBERATIONS.

The prosecutors offered demonstrative evidence to support their theory that Mr. Peterson put Laci, who was nine-months pregnant, in a toolbox in the back of his truck. (62 RT 12186, 12192.) The prosecutors offered demonstrative evidence to support their theory that a woman who was nine months pregnant could fit in the back of Mr. Peterson's boat. (62 RT 12192.)

But the prosecutors did *not* offer any demonstrative evidence to support their theory that the body of a woman who was nine months pregnant, with homemade anchors attached to her arms and legs, could be pushed off a 14-foot boat without capsizing the boat. According to police detectives Grogan and Hendee, the district attorney's office discussed presenting such evidence but decided against it. (67 RT 12984; 99 RT 18599.) Instead, the prosecutor called David Weber who testified that in tests performed on the same model boat in an Indiana swimming pool in 1979 -- without waves or currents -- the boat was stable. (71 RT 13847, 13851-13853, 13854, 13866-13868, 13874.)

The defense sought to fill the obvious gap in the demonstrative evidence. The defense offered to introduce videotape evidence of a demonstration it had performed. The defense made a detailed offer of proof showing that the demonstration involved (1) the same boat model, (2) the same location as theorized by the prosecution (just off Brooks Island), (3) a person (Mr. Raffi Naljian from defense counsel's office) wearing a weight belt so that he weighed the same as Scott Peterson, (4) a mannequin which weighed the exact amount as Laci Peterson attached to anchors which weighed the same amount as the state theorized. (62 RT 12186; 104 RT 19371, 19401, 19404; 20 CT 6338-6339.) The demonstration was done at the same time of day theorized by the state (12:30 to 1:00 p.m.) and the demonstration was filmed. (104 RT 19404-19405.) The experiment showed that the boat capsized.

The state objected. (104 RT 19402-19403.) The trial court expressed concern that the defense had not used Mr. Peterson's actual boat. (104 RT 19408.) Ultimately, the court excluded the proffered demonstrative evidence. (104 RT 19407.) The court ruled that it would provide the actual boat to defense counsel for a test but only if the prosecution was allowed to be present during any experiment. (104 RT 19413-19414.) Defense counsel refused the offer, making clear his view that the court's limitation on the defense's ability to use the actual boat -- permitting access to the boat only on condition that the state be present for any test -- was an unconstitutional limit on the ability of the

defense to present its case. (113 RT 20960.) For its part, the state elected not to present demonstrative evidence on this point. (*See* 99 RT 18599.)

On the third day of deliberations, the jury performed an experiment to fill this gap. Allowed to examine the boat which was sitting on a trailer in a garage, several jurors got in the boat and began to rock it back and forth to test its stability. (111 RT 20643-20644.) After defense counsel objected, the trial court made clear that when it permitted the jurors to see the boat it did not know the jurors would "jump up and down on the boat . . . ." (111 RT 20645.) Later, the court agreed with defense counsel that jurors in the boat were shifting their weight back and forth from one leg to another. (111 RT 20646.)

Defense counsel renewed his request to introduce the demonstration the court had earlier excluded. (111 RT 20643-20644, 20647.) In the alternative, defense counsel asked for a mistrial. (111 RT 20647.) The court denied both motions. (111 RT 20647-20648; 112 RT 20713.)

In his opening brief, Mr. Peterson contended that reversal was required for three distinct reasons. First, the trial court violated both state and federal law in excluding the demonstrative evidence when it was originally offered by the defense. (AOB 308-318.)

Second, even if the initial ruling excluding the evidence was proper, the court violated the Fifth and Sixth Amendments when it ruled that the defense would not have access to the actual boat for testing unless the prosecution was present at any such testing. (AOB 320-333.) Finally, the attempt by jurors to fill the evidentiary void by performing a stability experiment of their own constituted an improper experiment which introduced entirely new information into the deliberative process. (AOB 333-342.)

The state disagrees on every count. According to the state, the trial court's exclusion of the demonstrative evidence was proper because the defense experiment was "not substantially similar to what was known about appellant's boat trip on the Bay." (RB 359. *See* RB 359-363.) In any event, the state argues any error was harmless since the state had introduced "credible evidence" that the boat was stable and could not capsize. (RB 371-372.) The state then defends the trial court's ruling that the defense could not use Mr. Peterson's actual boat in any experiment unless the prosecution team was present and argues that, in any event, there was no prejudice. (RB 373-383.) Finally, the state argues the jurors performed no improper experiment, they simply manipulated one of the trial exhibits and that there was no prejudice since the evidence was merely cumulative to evidence already introduced. (RB 384-392.) Each of these arguments will be addressed in turn.

### A. The Trial Court Erred In Excluding The Demonstrative Evidence Offered By The Defense.

The state concedes that parties may introduce evidence of experiments "conduct[ed] under conditions the same or substantially similar to those of the actual occurrence." (RB 365-366.) The state's entire argument here is that "the defense failed to show that its boat stability experiment was conducted under conditions that were substantially similar to those involving appellant's boat trip . . . on December 24." (RB 366.)

There is, of course, a fundamental irony in the state's position. In its case-in-chief at trial, the prosecution introduced the results of stability tests run in 1979. These tests were not with Mr. Peterson's boat, but with the same model boat. (71 RT 13847, 13851-13854, 13866-13868, 13874.) These tests were not run in San Francisco Bay, or even in salt-water, but in a confined freshwater swimming pool. (*Ibid.*) These tests did not involve waves, currents, tides or winds. (*Ibid.*) In fact, these tests were run with water in the bottom of the boat to stabilize it. (*Ibid.*) These tests were apparently "substantially similar" enough to be admissible when it was the *state* offering the evidence.

Here, the defense also offered a stability test. According to defense counsel's specific offer of proof, the defense test was performed (1) with "the exact same [model] boat," (2) with a life-sized mannequin weighing 155 pounds (the same weight as Laci Peterson), (3) in the San Francisco Bay, "[r]ight off Brooks island" at "12:30, 1:00" in the afternoon, (4) with weather, wave and tidal conditions that were "calmer" than on December 24 (and therefore *less* likely to result in capsizing) and (5) with Mr. Naljian wearing a 20 pound weight belt to bring him to Scott's Peterson's same weight. (104 RT 19404-19405.)

Under the state's thesis, the prosecution's test was fine, but the defense test was not similar enough to be admissible. The state makes no attempt to explain why the prosecution's stability test -- performed in an Indiana swimming pool without waves, tides or currents and without mannequins to represent either Scott or Laci Peterson -- was admissible but the defense stability test -- performed in salt water, in the same area of the Bay as the state theorized was involved on December 24, at the same time of day, involving waves, tides and currents and using mannequins and anchors of the same weight as Scott and Laci -- was not.

After receiving defense counsel's detailed offer of proof at trial, the prosecutors made three points. First, they noted that because there were no eyewitnesses who testified

as to what happened on the boat, there was no way of knowing if the body had been pushed off the gunwale of the boat as was done in the defense experiment. (104 RT 19406-19407.) Second, they noted that the boat used in the demonstration was not "exactly the same boat" as Mr. Peterson's boat. (104 RT 19407.) Finally, they noted that their "biggest concern" was a piece of plywood in the boat which changed the stability of the boat. (104 RT 19407.) On appeal, the state argues that the experiment was not "substantially similar" (and was therefore properly excluded) because (1) the defense did not use Mr. Peterson's actual boat, (2) there was no evidence that the body was thrown from the gunwale (as opposed to some other part of the boat), and (3) the defense offered no "credible testimony as to exact location on the Bay where the experiment was conducted or whether the wind and wave action was comparable to the conditions on December 24, 2002." (RB 366-367.)

The state is correct that the defense did not use "exactly the same boat." Instead, just like the experiment about which state expert Weber testified, the defense used what defense counsel explained was the "exact same boat." (104 RT 19404.) The law in this area is quite clear.

When it is the state that seeks to admit demonstrative evidence, the state need not use the exact same instrumentality so long as the items used are "substantially similar."

For example, when a crime involves a car or a gun, experiments are admissible even when they involve a different gun or a different car, so long as the items used are "substantially similar." (*See*, *e.g.*, *People v. Turner* (1994) 8 Cal.4th 137, 196-198 [victim was killed by a .38 caliber gun, test performed with a different gun of the same caliber with "similar ammunition;" held, test results properly admitted since relevance requires test to be under "substantially similar, although not necessarily identical, conditions as those of the actual occurrence."]; *People v. Crawford* (1940) 41 Cal.App.2d 198, 205 [in murder case where defendant's car went over a cliff with the victim in it, defendant said his brakes failed as he drove downhill, state performed test using different cars to show that even if brakes failed, car would not have gone off the cliff; held, tests admissible even though cars were of "different makes, models and weights" than defendant's car].) And the Court need look no further than this case to know that the same rule applies to boats -- the trial court admitted stability tests offered by the prosecution which were *not* performed on Mr. Peterson's boat itself, but on the same model boat.

But when it comes to evaluating the stability tests offered by the defense, the state ignores these aspects of *Turner* and *Crawford* entirely. (RB 365-373.) As defense counsel explained in his offer of proof, he used the "exact same boat." (104 RT 19404.) That is all -- and indeed may be more than -- what *Turner* and *Crawford* require. As

*Crawford* shows, the fact that the boat used might not weigh the exact same amount as Scott's boat is an insufficient basis to exclude the experiment.[23]

The state's second point -- that there was no evidence the body was, in fact, thrown from the gunwale as was done in the demonstration -- it also true. The problem with the state's position is that this is not the first time this very argument has been tried. And the Court has already rejected it.

In *People v. Turner*, *supra*, 8 Cal.4th 137, this Court held that even where specific circumstances of a crime are unknown, the *state* may offer demonstrative evidence to prove the state's theory of what happened. By a parity of reasoning, where the specific

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[23] The state's appellate lawyers see ambiguity in defense counsel's offer of proof, suggesting it is "unclear if the boat used in the experiment was, in fact, the same model as appellant's boat." (RB 366.) But there was nothing at all in defense counsel's offer of proof that could lead to the ambiguity now expressed by the state's lawyers:

> "MR. GERAGOS: The boat is the same type boat.
>
> "[PROSECUTOR] HARRIS: It's the same boat?
>
> "MR. GERAGOS: Exact same boat." (104 RT 19404.)

In light of the clarity of defense counsel's offer of proof, it is not apparent where the state sees ambiguity here. To the extent the state is suggesting defense counsel was not being truthful with the trial court, it is worth noting that after counsel personally assured the trial court the defense had used "the exact same" model boat, the trial prosecutors expressed no such concern. (104 RT 19404.)

circumstances of a crime are unknown, the defense should be permitted to offer demonstrative evidence to disprove the state's theory.

*Turner* involved a defendant charged with a July 11, 1979 murder in an airport hanger. Microphones at the airport had picked up the sound of two sharp noises at the time of the murder. (8 Cal.4th at p. 195.) The prosecution's theory was that these two noises were .38 caliber gunshots. To prove this theory, police performed an experiment, obtaining a tape recording of gunshots in the hanger and comparing the experimental tape to the original tape recording. (8 Cal.4th at pp. 196-197.) The prosecution's goal was to establish that the original tape had actually recorded two .38 caliber gunshots.

On appeal, defendant contended the experimental tape should not have been admitted, making the *identical* argument the state makes here. The defendant argued that "because it is not definitively known what caused the sounds on the July 11 tape, it is impossible to conduct an experiment under conditions similar to the actual occurrence." (8 Cal.4th at p. 199.) The Court rejected this argument noting that "the purpose of the experiment was to assist the jury in making this factual determination" and concluding "the experiment was not rendered inadmissible because it could not conclusively 'prove' that the July 11 sounds were gunshots." (8 Cal.4th at p. 199.)

Although *Turner* was cited and discussed in the opening brief (AOB 314, n. 50), the state ignores this aspect of *Turner* entirely. But *Turner* controls here. The state's suggestion that the defense was properly barred from introducing demonstrative evidence because the state could not "definitively" prove what happened is the *exact* argument this Court rejected in *Turner*. Indeed, as defense counsel pointed out with some frustration in responding to this argument below, the state's argument is too clever by half -- it prevents defendants from ever testing a theory offered by the state when there is no eyewitness testimony as to what actually happened. (*See* 104 RT 19407-19408.) Pursuant to *Turner* the state's failure to put forth a "definitively known" theory as to how and where the body was pushed off the boat does not immunize the state from having its theory tested by demonstrative evidence in the adversary system.

The state's final argument is that the experiment was not "substantially similar" because the defense offered no evidence as to the "exact location on the Bay where the experiment was conducted or whether the wind and wave action was comparable to the conditions on December 24, 2002." (RB 367.) Yet again, the state's current suggestion that this kind of information is a necessary prerequisite to introduction of a stability test flies in the face of the prosecution's admission of and reliance on such a test performed in a freshwater swimming pool with no tides, currents or waves at all.

But even setting the obvious disparity in the state's approach to the stability tests offered at trial, the fact of the matter is that defense counsel *did* provide this very information to the trial court. The record shows the trial prosecutors initially objected to admission of the defense evidence for a number of reasons, including the lack of information as to "where it took place," and "what the wave conditions were." (104 RT 19403.) In response, defense counsel made a specific offer of proof that the experiment was performed just off Brooks Island (where Dr. Cheng had said the bodies were put in the Bay), at "12:30, 1:00" (the relevant time period under the state's theory) and it was "a calmer environment than would have been on December 24th, according to their own expert Ralph Cheng." (104 RT 19404, 19405.) If anything, of course, a calmer environment would make capsizing *less* likely. In addition, of course, the video itself shows exactly what the wave conditions were. The trial prosecutors did not dispute that

this offer of proof satisfied these parts of their objection. The state's suggestion that this information was not provided to the trial court is simply wrong.[24]

Finally, the state argues that even if the trial court erred in excluding this evidence, the error was harmless under the state's *Watson* standard for assessing errors of state law. (RB 371-372.) For the reasons set forth in the opening brief, however, the exclusion of this important evidence did not simply violate state law, it also violated federal law. (AOB 315-318.) As the state concedes, the prosecutor was permitted to introduce several witnesses to testify about the stability of the boat. (RB 372.) Thus, the trial court's exclusion of the defense evidence not only prevented the defense from introducing important evidence in support of the defense theory (in violation of defendant's rights to

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[24] The state could be making a very different argument. In referring to a failure to "proffer[] . . . credible testimony" on these points the state could be arguing that defense counsel's very specific offer of proof on these points was somehow insufficient. Under this argument, defense counsel had to go further and formally offer sworn testimony on these subjects in a section 402 hearing to prove that he was not lying or mistaken about where and when the experiment was conducted and what the conditions were.

If that is the state's argument, it has been waived. Offers of proof are commonly made at trial by lawyers for both sides. If the trial prosecutors here were skeptical of or not satisfied with defense counsel's oral offer of proof -- either because they believed counsel was mistaken or untruthful with the court -- they had an obligation to say so at trial when defense counsel could make a record by calling witnesses. What the state has done here is not say anything about defense counsel's offer of proof at trial but, on appeal, turn around and argue defense counsel should have called witnesses to substantiate his representations.

present a defense and to compulsory process), but it violated his Due Process right to contest the state's case. Thus, the question is whether the state can prove this error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 384 U.S. 18, 24.)

It cannot. The state accurately notes that the prosecution introduced several witnesses to testify as to how stable the boat actually was. (RB 371-372.) But this is not the *solution* to the prejudice problem, it *is* the prejudice problem.

Defendant had a constitutional right not only to present evidence supporting the defense theory, but to contest the state's theory. Contrary to the state's current assumption, the fact that the prosecution at trial made boat stability a key issue by calling several witnesses on the subject and arguing it during closing argument is not a reason to find exclusion of the only defense evidence on the point harmless, it is a reason to find it prejudicial. This is especially true here where the jurors themselves recognized the importance of this testimony during deliberations by asking to see the boat and testing the stability while it was in the garage. While the parties may (and do) disagree over whether this action by the jurors constitutes an improper experiment, the state does not dispute that it shows how important the subject was to the deliberating jury. The court's exclusion of the defense evidence requires reversal.

### B. The Trial Court Violated Defendant's Right To Counsel In Refusing To Permit Defendant To Use Scott's Actual Boat In An Experiment Unless The Prosecution Was Present.

In his opening brief Mr. Peterson contended that even if the trial court's initial ruling excluding the demonstrative evidence was proper, the court violated his rights to due process and the effective assistance of counsel when it ruled the defense could not test the actual boat unless the prosecution was present at any such testing. (AOB 320-333.) The state disagrees for three mains reasons. First, the state argues that in order to preserve the issue for appeal, defense counsel was required to test the boat in the prosecutor's presence. Absent that, the state argues, there is no "justiciable claim" and the issue is waived. (RB 373-374.) Alternatively, the state defends the court's ruling as a legitimate intrusion on the defense function. (RB 375-381.) Finally, the state argues that even if the court's ruling violated the constitution "appellant must demonstrate prejudice" and he has not done so. (RB 381.) Each of these arguments should be rejected.

#### 1. Because the trial court's order violated the Fifth and Sixth Amendments, the claim is properly before this Court.

The state first argues that the merits of this issue are not properly before the Court.

(RB 373-374.) In the state's view, "a justiciable claim is lacking" and "appellant has waived the issue" because defense counsel did not comply with the trial court's order and test the boat under the court-imposed condition of complete disclosure to the prosecution. (RB 373-374.) The state complains that appellant is asking the court to give an advisory opinion as to whether there was a constitutional violation. (RB 373-374.) Under the state's view, the only way defense counsel could preserve this issue for merits review was to go "all in;" that is, give in to the court's order and test the boat in the prosecutor's presence.

Neither case law nor common sense support the state's all-or-nothing position. First the case law.

Elsewhere in its brief, the state discusses at length *People v. Varghese* (2008) 162 Cal.App.4th 1084. (RB 377-378.) But the state does not discuss *Varghese* at all in connection with its all-or-nothing waiver argument. This is curious.

In *Varghese*, the trial court issued an order very much like the one at issue here, hinging the defendant's ability to test evidence on disclosure of the test results to the prosecution. (162 Cal.App.4th at p. 1091.) Defense counsel did not comply with the

court's condition. Instead, he took the same approach taken by defense counsel here, electing *not* to test the evidence. (*Id*. at p. 1092.) On appeal, defendant argued that the trial court's ruling violated his right to counsel. The court rejected the argument precisely because the testing would have destroyed the rest of the sample -- in that case, biologic evidence which was being DNA tested. (*Id*. at pp. 1093-1096.) But as relevant to the state's all-or-nothing waiver argument, the important part of *Varghese* is that the court fully addressed the merits of the claim *even though defendant did not comply with the trial court's condition and instead elected not to test the sample*. (*Id*. at pp. 1091-1096.)

*Varghese* is not the only California precedent which is irreconcilable with the state's all-or-nothing theory. *Prince v. Superior Court* (1992) 8 Cal.App.4th 1176 involved a rape homicide case in which the state obtained vaginal swabs from the victim containing semen presumably from the murderer. The trial court divided the biologic evidence obtained from these swabs between the state and the prosecution. Although each side had enough evidence to perform multiple tests, the trial court nevertheless hinged the ability of the defense to test its evidence on the presence of the state's experts. There too the defendant did not comply with the court's condition, but instead challenged it before doing any testing. (8 Cal.App.4th at p. 1179.) The defendant argued this violated his Fifth and Sixth Amendment rights. (8 Cal.App.4th at pp. 1179-1180.) The court agreed precisely because the state could perform its own testing. (*Id*. at pp. 1179-

1181.) As relevant to the state's all-or-nothing waiver argument, however, the important part of *Prince* is that the court fully addressed the merits of the claim even though defendant did not comply with the court's condition and instead elected *not* to test the sample. (*Ibid*.)

The United States Supreme Court has also reached this same result in an analogous context. In *Brooks v. Tennessee* (1972) 406 U.S. 605 the trial court ruled that if defendant wanted to testify, he had to do so first before any other witnesses. Just like the defendants in *Varghese* and *Prince*, the defendant did not comply with the court's condition. Instead, he elected not to testify. On appeal, he contended the trial court's condition infringed his Fifth Amendment privilege against self-incrimination as well as his Sixth Amendment right to counsel. Writing for a three-justice dissent, Justice Rehnquist argued that no Fifth Amendment issue was presented because defendant had not been forced to testify. (406 U.S. at p. 617.) But the majority explicitly rejected this relatively mechanical approach, recognizing the more nuanced and real-world burden on the privilege against self-incrimination caused by the trial court's ruling. (406 U.S. at p. 611 and n.6. *Accord United States v. Nobles* (1975) 422 U.S. 225 [lower court precluded defense from calling a witness unless defense counsel gave the prosecution an interview report from that witness, defense counsel refused to comply with the court's condition and elected not to call the witness, on appeal, defendant contended the condition was

improper; held, merits addressed even though counsel did not comply with the trial court's condition]; *Childress v. State* (Ga. 1996) 266 Ga. 425, 432-434 [prior to trial, the court orders the defense to disclose to the prosecution all expert reports even if the expert is not going to be called by the defense as a witness, rather than comply with this order defendant elects not to consult a ballistics expert and challenges the order on appeal; held, merits of the issue properly addressed and reversal is required].)

The state ignores *Varghese*, *Prince*, *Brooks* and *Nobles*. Yet every one of these cases counsels rejection of the state's position.

So does common sense. The state's entire argument is premised on the assertion that "the facts never gave rise to a potential constitutional violation." (RB 373-374.) The suggestion reflects a puzzling misunderstanding of the adversary system.

Of course these facts gave rise to a constitutional violation. Requiring defense counsel in a criminal case to conduct experiments and prepare demonstrative evidence under the ever-present eye of the prosecutor -- effectively requiring automatic disclosure of defense investigation to the prosecution -- is anathema to the proper role of defense counsel in an adversary system. This explains why case after case has held that the state

may *not* require the defense to share investigators with the prosecution, it may *not* require the defense to share experts with the prosecution and it may *not* condition investigative or expert assistance to the defense on automatic disclosure of any resulting evidence to the prosecution. (*See Powell v. Collins* (6th Cir. 2003) 332 F.3d 376, 392 [forcing defendant to share an expert with the prosecution violates Due Process]; *Smith v. McCormick* (9th Cir. 1990) 914 F.2d 1153, 1159-1160 [same]; *United States v. Sloan* (10th Cir. 1985) 776 F.2d 926, 929 [same]; *United States v. Alvarez* (3rd Cir. 1975) 519 F.2d 1036, 1045-1046 [requiring reports of defense expert to be automatically turned over to the prosecution violates the right to counsel]; *Childress v. State*, *supra*, 266 Ga. at pp. 432-434 [same]; *Marshall v. United States* (10th Cir. 1970) 423 F.2d 1315, 1319 [order appointing FBI to investigate case for defendant violates the constitution].)

The state's all-or-nothing waiver argument should be rejected here, just as it has in every other case.

2. Precluding the defense from testing evidence unless the prosecution team was present at the test invaded the defense camp in violation of both due process and the right to counsel.

On the merits, the state defends the trial court's ruling as a legitimate intrusion on

the defense function. Citing *United States v. Nobles*, *supra*, 422 U.S. 225, the state notes that "the Sixth Amendment does not confer the right to present testimony free from legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." (RB 375.) The state argues that is "precisely what is at risk here." (RB 375.)

In fact, however, the trial court's ruling here had nothing at all to do with "the right to present testimony free from legitimate demands of the adversarial system." Instead, the trial court's ruling here had to do with defense counsel's ability to investigate and prepare his case, and consult with his investigators and experts, away from the prying eyes of the prosecution team. The facts of *Nobles* -- which the state ignores completely -- make this distinction plain.

In *Nobles* the defendant was convicted of bank robbery. At trial, he sought to impeach several prosecution eyewitnesses with statements they had made to a defense investigator. The lower court held that defense counsel could not call the investigator to testify at trial unless he provided a copy of the investigator's report to the prosecution for use in cross-examination. (422 U.S. at p. 228.) Ultimately, defendant refused to provide the report and the investigator was not called as a witness. (42 U.S. at p. 229.) After defendant was convicted, he appealed and the Circuit Court reversed. The Supreme

Court granted certiorari and upheld the conviction noting that the trial court's ruling "was quite limited in scope, opening to prosecution scrutiny only the portion of the record that related to the testimony the investigator would offer to discredit the witnesses' eyewitness identification testimony." (422 U.S. at p. 240.) The Court emphasized that there was no intrusion on the right to counsel precisely because "the disclosure order resulted from [counsel's] voluntary election to make testimonial use of his investigator's report." (422 U.S. at p. 240, n.15.)

*Nobles* does even remotely authorize the invasion of the defense camp permitted in this case. Here, the court ruled that the defense could not conduct an experiment unless it did so with the prosecution team present. This is a far cry from requiring the defense to disclose a report prepared by a witness it has elected to call where the report involves the subject of the witness's testimony. The analogy to *Nobles* would make sense here if the trial court in *Nobles* had precluded the defense investigator from even interviewing the eyewitnesses except in the presence of the prosecutor. But that, of course, was *not* what was involved in *Nobles*.

In short, Mr. Peterson quite agrees that "the Sixth Amendment does not confer the right to present testimony free from legitimate demands of the adversarial system." But the order in this case -- unlike *Nobles* -- was not about presenting testimony at all. It was

about precluding the defense from even investigating its case. Put another way, as every case in the country has recognized, the "legitimate demands of the adversary system" on which the state now places so much reliance have never before contemplated the court-mandated presence of the prosecution team during defense investigation. (*See*, *e.g.*, *Powell v. Collins*, *supra*, 332 F.3d at p. 392; *Smith v. McCormick*, *supra*, 914 F.2d at pp. 1159-1160; *United States v. Sloan*, *supra*, 776 F.2d at p. 929; *United States v. Alvarez*, *supra*, 519 F.2d at pp. 1045-1046; *Marshall v. United States*, *supra*, 423 F.2d at p. 1319; *Childress v. State*, *supra*, 266 Ga. at pp. 432-434.) As this Court has itself noted:

> "A defendant's Sixth Amendment right to the assistance of counsel in the preparation of a case for trial likewise encompasses the assistance of, and confidential communication with, experts in preparing a defense. . . . The right logically extends to the opportunity to investigate and develop evidence generally." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046.)

The state does not discuss a single one of these cases. (RB 373-383.) The state does not even cite a single one. (RB 373-383.) Instead, the state complains that if the Sixth Amendment does not allow it to observe defense experiments, it "would [be] at a distinct disadvantage [in] meaningfully rebut[ting] such 'evidence' . . . ." (RB 376.) Absent the court's order, and like every other litigant in the adversary system, "the prosecution would be relegated to having to rebut" whatever evidence of the experiment

the defense presented in court. (RB 380.) According to the state, these grim prospects support the trial court's ruling allowed the prosecution team to invade the defense camp.

Again, however, the state's position reflects a basic misunderstanding of the adversary system. In a criminal case, the ability of a *defendant* to "meaningfully rebut" evidence offered by the state is not typically achieved by permitting the defendant, his lawyer or his investigators to be present during the state's initial investigation of the case or preparation of demonstrative evidence. It is undoubtedly true that permitting the defense team to observe the state's investigation and preparation of its case would make it easier for the defense to "meaningfully rebut" the state's case in court. But that is not how the adversary system works in the real world, and it is not how it has ever worked. Instead, "meaningful rebut[tal]" is achieved through the tools of the adversary system itself: the opportunity for discovery, compulsory process, to present defense evidence and the right to cross-examine.

Of course, these same tools of the adversary system are fully available to the state. The position of the state's appellate lawyers that in this case, "meaningful rebut[tal]" required the trial court to shatter the adversary system and give the prosecution a seat at the defense table simply misunderstands what the opportunity for "meaningful rebuttal" really is in an adversary system.

Mr. Peterson will be clear about his position. He does not dispute that the state is entitled to rebut his evidence in the context of the adversary system. And as the state would no doubt concede, the converse is also true: a defendant too has every right to rebut evidence offered by the state. (*See Baldwin v. Hale* (1864) 1 Wall. 223, 233; *In re Oliver* (1948) 333 U.S. 257, 275.)

But the parties have very different views as to how to effectuate the right to rebut evidence. As the state candidly concedes, at trial three witnesses testified about the stability of the boat. (RB 372.) The defense sought to rebut the state's position in this area by offering demonstrative evidence through the adversary system, evidence which would be subject not only to rebuttal by the state but to the crucible of cross-examination as well.

The state's approach to meaningful rebuttal is quite different. In stark contrast to the defense, the state sought to ensure meaningful rebuttal of the defense case *not* by working within the adversary system, but by performing an end run around that system entirely and intruding upon the defense function. The state's suggestion that invading the defense function comes within the "legitimate demands of the adversarial system" assumes an adversary system envisioned by Orwell or Kafka, not Jefferson and Adams.

To be sure, as Mr. Peterson recognized in his opening brief, even in an adversary system there may be situations where the prosecution is properly permitted to observe defense experiments. Thus, where a defendant seeks to test biologic evidence -- and the defense tests will consume the evidence so that the state could not re-test the evidence -- it is entirely proper to permit the testing to be performed in the presence of both parties. (*See*, *e.g.*, *People v. Cooper* (1991) 53 Cal.3d 771, 815; *People v. Varghese*, *supra*, 162 Cal.App.4th at p. 1095.) But the rule permitting the state to be present at defense testing is a narrow exception to the general rule, and has *never* been applied where the state has the ability to do its own test. (*Prince v. Superior Court*, *supra*, 8 Cal.App.4th at pp. 1179-1180; *State v. Mingo* (N.J. 1978) 392 A.2d 590, 592-593, 595.)

Indeed, for all its ardor on this issue, *the state does not cite a single case that has ever countenanced an invasion of the defense camp where the state could simply do a test of its own*. (RB 375-381.) Nor does the state dispute that in this case, it was free to perform its own test on the boat if it wanted to. Under these circumstances, the court's order precluding the defense from testing the boat unless the prosecution team was

present for the test was an indefensible intrusion into the defense function.[25]

3. The trial court's ruling precluding defense counsel from investigating this portion of the defense case unless the prosecution team was present cannot be found harmless.

In his opening brief, Mr. Peterson contended that because the Sixth Amendment

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[25] The state suggests several times in its brief that unless the prosecution was permitted to intrude on the defense investigation "important details could have been effectively altered or destroyed." (RB 376.) Under this theory, intrusion into the defense function was proper because "the prosecution's presence ensured that the defense could not be able to alter or destroy evidence pertaining to the stability of appellant's boat . . . ." (RB 378.)

The state cites nothing in the record to support any suggestion that the trial court based its ruling on a case-specific finding that defense counsel was going to alter or destroy evidence. And aside from the state's ominous suggestion that "important details" could be lost it almost goes without saying that the state does not explain what these "important details" could be. The state certainly did not fear the loss of "important details" when it performed a similar test using the boat in *People v. Roehler*, *supra*, 167 Cal.App.3d 353.

Absent a case-specific finding by the trial court, the state's argument that trial courts can freely order the prosecution team to be present during defense investigation to guard against a hypothetical "altering or destruction" of evidence simply means that such orders would be proper in every case. Moreover, since there is no reason to think tests by prosecutors would "alter or destroy" evidence at any different rate than tests by defense lawyers, such orders would be proper in every case in favor of the defense as well. Presumably the state would not dispute that such orders would constitute a sea change in the adversary system, at least the adversary system that has been in place in California since it became a state.

violation here was caused by the trial court itself, prejudice was presumed and reversal was required. (AOB 328-333.) The state disagrees, arguing that "[a]ppellant must demonstrate prejudice . . . ." (RB 381.) The state is wrong for two reasons.

First, as discussed in the opening brief, where the state itself substantially interferes with the ability of a defense lawyer to conduct the defense, prejudice is presumed. (AOB 328-332.) The state's reliance on *People v. Hernandez* (2012) 53 Cal.4th 1095 -- where the trial court precluded defense counsel from speaking with his client about one witness's sealed plea agreement -- does not change this result. As the Court noted, the state-imposed limitation in *Hernandez* was anything but substantial. Although counsel could not talk about the plea agreement prior to the witness testifying, "he was not prevented from discussing how to respond to [it] after hearing it." (53 Cal.4th at p. 1106.) So the state action in *Hernandez* simply impacted when counsel could discuss a single matter with his client. Here, the state action effectively prevented defense counsel from testing important evidence in an effort to "meaningfully rebut" the state's case.

But even if prejudice was not presumed, the state's suggestion that "appellant must demonstrate prejudice" is still wrong. As discussed in detail in the opening brief, the court's order here violated not only the Sixth Amendment right to counsel, but Due

Process as well. (AOB 326-327. *See Powell v. Collins*, *supra*, 332 F.3d at p. 392 [forcing defendant to share an expert with the prosecution violates Due Process]; *Smith v. McCormick*, *supra*, 914 F.2d at pp. 1159-1160; *United States v. Sloan*, *supra*, 776 F.2d at p. 929 [same].) This requires the state to prove the error harmless beyond a reasonable doubt. (AOB 333, n.53. *See Chapman v. California*, *supra*, 384 U.S. at p. 24.)

Aside from asserting that the error would be harmless under this standard, the state makes no case-specific argument to that effect. (RB 383.) For the reasons set forth in the opening brief, the error requires reversal under both *Chapman* and *Watson*. (AOB 333, n.53. *See also Childress v. State*, *supra*, 266 Ga. at pp. 433-434 [defendant charged with double homicide, trial court erroneously orders defense counsel to disclose to the state reports from all experts even if they do not testify, defense counsel elects not to pursue a ballistics expert in light of the court's order; held, reversal was required because (1) a favorable ballistics report would have undercut the state's theory and (2) an adverse ballistics report (which defense counsel would have had to provide to the state) would have undercut the defense].)

Here, the jury's actions during deliberations in testing the stability of the boat -- even if they do not constitute an improper experiment -- show the jury was concerned with the boat's stability. (*See* 111 RT 20643.) The prosecutor's decision to call expert

and lay witnesses on this subject, and to focus in closing argument on the absence of any evidence from the defense on this subject, shows how important this subject was to the state. (62 RT 12153-12155; 71 RT 13851-13874, 13794-13796; 109 RT 20292-20294.) And although (as in *Childress*) the court's order resulted in no test being performed, the fact of the matter is that in the demonstration which the defense did perform -- and which the trial court excluded -- the boat did capsize. Under all these circumstances, this case is very much like *Childress*; a favorable test result would indeed have undercut the state's case, and an adverse test result would have seriously undermined the defense. Reversal under any standard is required.

### C. The Jury's Stability Experiment On The Boat During Deliberations Requires Reversal.

During deliberations, several jurors got into Mr. Peterson's boat -- which was on a trailer in a garage -- and rocked it back and forth to test its stability. (111 RT 20643.) The parties agree that in determining whether this constituted an improper jury experiment the question is whether the jurors were "carry[ing] out experiments within the lines of offered evidence" or whether the experiment did "not fall fairly within the scope and purview of the evidence." (RB 387, citing "the venerable authority" of *Higgins v. L.A. Gas & Electric Co*. (1911) 159 Cal. 651.) In applying this test, courts have made

clear that where jurors perform experiments with physical evidence which departs from the conditions of the event at issue or the trial testimony, the experiments inject new evidence into the case and are improper. (*See*, *e.g.*, *Bell v. California* (1998) 63 Cal.App.4th 919, 932; *Smoketree-Lake v. Mills Concrete Construction Co*. (1991) 234 Cal.App.3d 1724, 1749; *People v. Castro* (1986) 184 Cal.App.3d 849, 855; *People v. Conkling* (1896) 111 Cal. 616, 627-628.)

Here, the state argues that mere manipulation of the boat was not an improper experiment. (RB 391.) The problem with the state's position is that this was *not* mere manipulation of the boat -- jurors were trying to assess the stability of the boat under conditions which did not even remotely track the testimony which had been given about the crime. After all, under the state's theory, Mr. Peterson pushed Laci overboard from the 14-foot boat while in the open ocean, near Brooks Island in weather that was rainy and windy. (*See* 62 RT 12065, 12088.) The jury's stability experiment was performed while the boat was not even on the water, but in a garage, sitting on a trailer. Just like *Bell*, *Smoketree*, *Castro* and *Conkling*, the jury demonstration here departed from all of the state's testimony about how the killing actually occurred. Pursuant to those authorities, the jury experiment was plainly outside "the lines of offered evidence" and introduced new evidence into the case.

In aid of its contrary argument the state cites *Henry v. Ryan* (9th Cir. 2013) 720 F.3d 1073. (RB 391-392.) It is hard to see why.

*Henry* was a habeas case where petitioner claimed jurors had conducted an improper experiment. The Ninth Circuit *explicitly* refused to address whether the jurors had committed misconduct. Instead the court held that petitioner would not even be permitted to appeal the issue because -- assuming error "a question we need not and do not reach" -- there could have been no prejudice from the experiment. (720 F.3d at p. 1086.) Because *Henry* never reached the question of error, it lends no support at all to the state's argument that the jury experiment here was proper.

Alternatively, the state makes a very short, two-part harmless error argument, contending the misconduct was harmless because (1) the jurors' actions were cumulative to evidence already introduced and (2) there was substantial evidence of guilt. (RB 392.) Because the "substantial evidence" prong of the state's analysis has been addressed in Argument IV-D above, there is no need to repeat it here. And as for the "cumulative evidence" argument, the fact of the matter is that the stability evidence obtained by jurors from testing the boat while sitting on a trailer in the garage was *not* "cumulative to evidence already adduced." (RB 392.) At trial, neither party introduced any evidence

about the stability of the boat while sitting on a trailer in a garage. Reversal is required.[26]

[26] In a passing reference, the state suggests that any presumption of prejudice was rebutted because the court gave a strong admonition to the jury that "stability of the boat on a trailer was a much different situation than stability of the boat on the water." (RB 392, *citing* 111 RT 20644-20645.) In fact, however, pages 20644-20645 show that the trial gave no such strongly worded admonition at all. The record shows the court made a bland comment to the jurors telling them "stability is not [the] same on a trailer as it is on the water." (111 RT 20644-20645.) Whether a strong admonition could indeed mitigate the harm caused by the experiment may be a legally interesting question, but in light of the comment which the trial court actually made, that question is not presented here.

## CONCLUSION

For all these reasons, and for the reasons set forth in the opening brief, a new trial be granted as to both guilt and penalty.[27]

DATED: July 23, 2015

Respectfully submitted,

CLIFF GARDNER
CATHERINE WHITE
LAZULI WHITT

By /s Cliff Gardner
Cliff Gardner
Attorney for Appellant

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[27] Mr. Peterson considers the remaining issues to be fully joined by the briefs currently on file with the Court. Accordingly no further discussion of those issues is required.

## APPENDIX A

(Prospective Jurors Who Answered Question 110 Yes
But Were Nevertheless Voir Dired By The Court)

The following jurors answered question 110 on the jury questionnaire "yes" -- indicating it would be difficult to vote for death if it were the defendant's first offense -- and were nevertheless voir dired by the trial court and parties. (3 CT Hovey 319, 16 RT 3351-3354 [Juror 4729]; 4 CT Hovey 825, 16 RT 3235-3236 [Juror 23926]; 5 CT Hovey 1078, 18 RT 3631-3632 [Juror 26120]; 6 CT Hovey 1400, 18 RT 3790-3792 [Juror 6181]; 8 CT Hovey 1929, 20 RT 4032, 4035, 4072-4074 [Juror 29445]; 9 CT Hovey 2297, 22 RT 4423-4425, 4428-4429 [Juror 7161]; 10 CT 2458, 23 RT 4595-4597 [Juror 7041]; 10 CT Hovey 2596, 18 RT 3733-3763 [Juror 29308]; 11 CT Hovey 2872, 13 RT 2625-2627 [Juror 16655]; 12 CT Hovey 3010, 26 RT 5046-5048 [Juror 16777]; 12 CT Hovey 3033, 26 RT 5049-5052 [Juror 16797]; 12 CT Hovey 3102, 26 RT 5143, 5173-5175 [Juror 16739]; 12 CT Hovey 3148, 26 RT 5143, 5170-5171 [Juror 18125]; 14 CT Hovey 3539, 28 RT 5338-5349 [Juror 8393]; 15 CT 3883, 29 RT 5571, 5579-5580 [Juror 8457]; 15 CT Hovey 3998, 29 RT 5516-5520 [Juror 8266]; 17 CT 4435, 29 RT 5793-5794 [Juror 258]; 26 CT 7062, 27 RT 5290-5321 [Juror 6782].)

APPENDIX B

During *Hovey* voir dire, 43 prospective jurors were called who indicated in their questionnaire that they strongly *supported* the death penalty. Of these 43 jurors, 29 (or 67%) believed Mr. Peterson was guilty. (2 CT Hovey 17, 19 [Juror 4388]; 2 CT Hovey 109, 111 [Juror 4469]; 2 CT Hovey 270, 272 [Juror 4868]; 3 CT Hovey 339, 341 [Juror 4762]; 5 CT Hovey 1006, 1008 [Juror 5865]; 5 CT Hovey 1029, 1031 [Juror 5947]; 6 CT Hovey 1466, 1468 [Juror 29325]; 7 CT Hovey 1581, 1583 [Juror 5989]; 7 CT Hovey 1673, 1675 [Juror 6040]; 8 CT Hovey 1903, 1905 [Juror 7070]; 9 CT Hovey 2248, 2250 [Juror 6964]; 9 CT Hovey 2271, 2273 [Juror 7114]; 10 CT Hovey 2524, 2526 [Juror 7192]; 13 CT Hovey 3375, 3377 [Juror 8183]; 15 CT Hovey 3972, 3974 [Juror 29579]; 15 CT Hovey 4018, 4020 [Juror 8458]; 16 CT Hovey 4386, 4388 [Juror 29827]; 17 CT Hovey 4409, 4411 [Juror 8576]; 21 CT Hovey 5629, 5632 [Juror 9623]; 22 CT Hovey 5909, 5911 [Juror 2479]; 23 CT Hovey 6162, 6164 [Juror 1314]; 23 CT Hovey 6208, 6210 [Juror 1478]; 25 CT Hovey 6944, 6946 [Juror 908]; 26 CT Hovey 7151, 7153 [Juror 105]; 27 CT Hovey 7473, 7475 [Juror 636]; 27 CT Hovey 7519 [Juror 12116]; 29 CT Hovey 8141, 8143 [Juror 4327]; 30 CT Hovey 8233, 8235 [Juror 11657]; 30 CT Hovey 8371, 8373 [Juror 2475].)

The remaining 14 of these 43 prospective jurors (or 33%) believed there was insufficient evidence of guilt. (3 CT Hovey 431, 433 [Juror 4889]; 6 CT Hovey 1420, 1422 [Juror 6394]; 8 CT Hovey 2018, 2020 [Juror 6775]; 9 CT Hovey 2156, 2158 [Juror 29277]; 14 CT Hovey 3720, 3722 [Juror 29486]; 14 CT Hovey 3766, 3768 [Juror 8384]; 15 CT Hovey 4064, 4066 [Juror 4650]; 15 CT Hovey 4087, 4089 [Juror 29717]; 19 CT Hovey 5169, 5171 [Juror 9540]; 22 CT Hovey 5932, 5934 [Juror 6691]; 23 CT Hovey 6231, 6233 [Juror 864]; 23 CT Hovey 6300, 6302 [Juror 295]; 27 CT Hovey 7611, 7613 [Juror 11168]; 30 CT Hovey 8417, 8419 [Juror 11398].)

During *Hovey* voir dire there were 52 prospective jurors who indicated in their questionnaire that they strongly *opposed* the death penalty. Of these 52 jurors, only 20 (or 38%) believed Mr. Peterson was guilty. (3 CT Hovey 454, 456 [Juror 4495]; 3 CT Hovey 500, 502 [Juror 4777]; 4 CT Hovey 638, 640 [Juror 11421]; 4 CT Hovey 661, 663 [Juror 21295]; 6 CT Hovey 1236, 1238 [Juror 6263]; 12 CT Hovey 3007, 3009 [Juror 16777]; 13 CT Hovey 3260, 3262 [Juror 8297]; 13 CT Hovey 3283, 3285 [Juror 18041]; 14 CT Hovey 3536, 3538 [Juror 8393]; 14 CT Hovey 3743, 3745 [Juror 29511]; 19 CT Hovey 5007, 5009 [Juror 24027]; 19 CT Hovey 5100, 5102 [Juror 9520]; 19 CT Hovey 5261, 5263 [Juror 9537]; 20 CT Hovey 5422, 5424 [Juror 23865]; 23 CT Hovey 6346, 6348 [Juror 583]; 24 CT Hovey 6484, 6486 [Juror 1550]; 24 CT Hovey 6507, 6509 [Juror

1583]; 26 CT Hovey 7289, 7291 [Juror 11213]; 29 CT Hovey 8026, 8028 [Juror 12043]; 30 CT Hovey 8394, 8396 [Juror 11876].)

The remaining 32 of these prospective jurors (or 62%) believed there was insufficient evidence of guilt. (2 CT Hovey 63, 65 [Juror 4755]; 2 CT Hovey 86, 88 [Juror 27605]; 2 CT Hovey 224, 226 [Juror 4841]; 3 CT Hovey 523, 525 [Juror 4878]; 4 CT Hovey 615, 617 [Juror 4931]; 4 CT Hovey 730, 732 [Juror 519]; 4 CT Hovey 868, 870 [Juror 593]; 5 CT Hovey 914, 916 [Juror 912]; 5 CT Hovey 937, 939 [Juror 29280]; 6 CT Hovey 1213, 1215 [Juror 6162]; 6 CT Hovey 1282, 1284 [Juror 6399]; 7 CT Hovey 1604, 1606 [Juror 6024]; 9 CT Hovey 2133, 2135 [Juror 7219]; 10 CT Hovey 2639, 2641 [Juror 16727]; 12 CT Hovey 3076, 3078 [Juror 18062]; 12 CT Hovey 3145, 3147 [Juror 18125]; 16 CT Hovey 4179, 4181 [Juror 8774]; 16 CT Hovey [Juror 8607]; 12 CT Hovey 4340, 4342 [Juror 10012]; 18 CT Hovey 4823, 4825 [Juror 9503]; 19 CT Hovey 5215, 5217 [Juror 9736]; 20 CT Hovey 5468, 5470 [Juror 24073]; 21 CT Hovey 5583, 5585 [Juror 23873]; 22 CT Hovey 5978, 5980 [Juror 7236]; 22 CT Hovey 6093, 6095 [Juror 924]; 22 CT Hovey 6116, 6118 [Juror 989]; 23 CT Hovey 6323, 6325 [Juror 455]; 25 CT Hovey 6829, 6831 [Juror 6555]; 25 CT Hovey 6852, 6854 [Juror 6633]; 27 CT Hovey 7358, 7360 [Juror 5909]; 28 CT Hovey 7819, 7821 [Juror 11172]; 30 CT Hovey 8256, 8258 [Juror 11520].)

APPENDIX C

During hardship voir dire, 136 prospective jurors indicated in their questionnaire that they strongly *supported* the death penalty. Of these 136 jurors, 104 (or 76%) believed Mr. Peterson was guilty. (*See* 2 CT Hardship 224, 226 [Juror 5797]; 3 CT Hardship 316, 318 [Juror 4449]; 3 CT Hardship 385, 387 [Juror 812]; 3 CT Hardship 592, 594 [Juror 4476]; 4 CT Hardship 730, 732 [Juror 4675]; 4 CT Hardship 753, 755 [Juror 4494]; 4 CT Hardship 776, 778 [Juror 4656]; 5 CT Hardship 1052, 1054 [Juror 4352]; 5 CT Hardship 1167, 1169 [Juror 4472]; 7 CT Hardship 1558, 1560 [Juror 4780]; 7 CT Hardship 1581, 1583 [Juror 4795]; 8 CT Hardship 1811, 1813 [Juror 4744]; 8 CT Hardship 1880, 1882 [Juror 4834]; 9 CT Hardship 2341, 2343 [Juror 4909]; 12 CT Hardship 3128, 3130 [Juror 746]; 13 CT Hardship 3495, 3497 [Juror 5823]; 13 CT Hardship 3518, 3520 [Juror 343]; 14 CT Hardship 3564, 3566 [Juror 5803]; 15 CT Hardship 3886, 3888 [Juror 254]; 17 CT Hardship 4600, 4602 [Juror 6119]; 18 CT Hardship 4945, 4947 [Juror 431]; 20 CT Hardship 5474, 5476 [Juror 6245]; 20 CT Hardship 5566, 5568 [Juror 6045]; 21 CT Hardship 5750, 5752 [Juror 6038]; 22 CT Hardship 6027, 6029 [Juror 4418]; 22 CT Hardship 6212, 6214 [Juror 29910]; 23 CT Hardship 6258, 6260 [Juror 7105]; 23 CT Hardship 6350, 6352 [Juror 6849]; 23 CT Hardship 6534, 6536 [Juror 6902]; 24 CT Hardship 6742, 6744 [Juror 7176]; 25 CT Hardship 6972, 6974 [Juror 6779]; 25 CT Hardship 7087, 7089 [Juror 7129]; 26 CT Hardship 7156, 7158 [Juror 1008]; 27 CT Hardship 7480, 7482 [Juror 6070]; 27 CT Hardship 7572, 7574 [Juror 6225]; 27 CT Hardship 7642, 7644 [Juror 16703]; 28 CT Hardship 7872, 7874 [Juror 17994]; 32 CT Hardship 8981, 8983 [Juror 8354]; 32 CT Hardship 9004, 9006 [Juror 8522]; 32 CT Hardship 9073, 9075 [Juror 589]; 32 CT Hardship 9165, 9167 [Juror 8480]; 33 CT Hardship 9349, 9351 [Juror 8527]; 34 CT Hardship 9648, 9650 [Juror 29585]; 35 CT Hardship 9809, 9811 [Juror 29514]; 35 CT Hardship 9878, 9880 [Juror 8495]; 36 CT Hardship 10177, 10179 [Juror 8650]; 36 CT Hardship 10223, 10225 [Juror 8729]; 36 CT Hardship 10269, 10271 [Juror 29751]; 37 CT Hardship 10614, 10616 [Juror 8663]; 38 CT Hardship 10823, 10825 [Juror 941]; 38 CT Hardship 10915, 10917 [Juror 8761]; 39 CT Hardship 11194, 11196 [Juror 16672]; 41 CT Hardship 11818, 11820 [Juror 9746]; 42 CT Hardship 11864, 11866 [Juror 26613]; 42 CT Hardship 12094, 12096 [Juror 8260]; 43 CT Hardship 12163, 12165 [Juror 8374]; 43 CT Hardship 12232, 12234 [Juror 8445]; 44 CT Hardship 12555, 12557 [Juror 9595]; 45 CT Hardship 12990, 12992 [Juror 9609]; 46 CT Hardship 13265, 13267 [Juror 9699]; 47 CT Hardship 13518, 13520 [Juror 489]; 47 CT Hardship 13564, 13566 [Juror 9899]; 48 CT Hardship 13772, 13774 [Juror 23991]; 48 CT Hardship 13910, 13912 [Juror 23923]; 49 CT Hardship 14050, 14052 [Juror 29820]; 49 CT Hardship 14211, 14213 [Juror 29711]; 51 CT Hardship 14556, 14558 [Juror 9989]; 53 CT Hardship 15200, 15202 [Juror 24120]; 54 CT Hardship 15499, 15501 [Juror 23886]; 54

CT Hardship 15614, 15616 [Juror 24067]; 54 CT Hardship 15660, 15662 [Juror 9694]; 56 CT Hardship 16143, 16145 [Juror 1177]; 56 CT Hardship 16212, 16214 [Juror 1340]; 56 CT Hardship 16304, 16306 [Juror 746]; 58 CT Hardship 16672, 16674 [Juror 329]; 58 CT Hardship 16741, 16743 [Juror 782]; 59 CT Hardship 17132, 17134 [Juror 1240]; 60 CT Hardship 17270, 17272 [Juror 18302]; 60 CT Hardship 17293, 17295 [Juror 907]; 62 CT Hardship 17890, 17892 [Juror 1148]; 62 CT Hardship 17959, 17961 [Juror 6660]; 62 CT Hardship 18097, 18099 [Juror 6722]; 64 CT Hardship 18442, 18444 [Juror 1590]; 67 CT Hardship 19454, 19456 [Juror 1545]; 67 CT Hardship 19500, 19502 [Juror 1604]; 68 CT Hardship 19638, 19640 [Juror 1526]; 69 CT Hardship 19983, 19985 [Juror 1438]; 71 CT Hardship 20650, 20652 [Juror 3373]; 72 CT Hardship 20926, 20928 [Juror 11232]; 72 CT Hardship 20972, 20974 [Juror 132]; 74 CT Hardship 21501, 21503 [Juror 1576]; 74 CT Hardship 21616, 21618 [Juror 11289]; 75 CT Hardship 21846, 21848 [Juror 1003]; 75 CT Hardship 21938, 21940 [Juror 2663]; 76 CT Hardship 22053, 22055 [Juror 12024]; 77 CT Hardship 22512, 22514 [Juror 545]; 78 CT Hardship 22811, 22813 [Juror 4060]; 81 CT Hardship 23730, 23732 [Juror 328]; 81 CT Hardship 23753, 23755 [Juror 12008]; 82 CT Hardship 24098, 24100 [Juror 11923]; 86 CT Hardship 25248, 25250 [Juror 743]; 88 CT Hardship 25685, 25687 [Juror 12096]; 88 CT Hardship 25731, 25733 [Juror 12167]; 88 CT Hardship 25869, 25871 [Juror 8799].)

The remaining 32 of these 136 prospective jurors (or 24%) believed there was insufficient evidence of guilt. (*See* 5 CT Hardship 1029, 1031 [Juror 4450]; 6 CT Hardship 1443, 1445 [Juror 4520]; 6 CT Hardship 1466, 1468 [Juror 4923]; 7 CT Hardship 1627, 1629 [Juror 18996]; 8 CT Hardship 1903, 1905 [Juror 21362]; 11 CT Hardship 2710, 2712 [Juror 449]; 12 CT Hardship 3034, 3036 [Juror 5888]; 17 CT Hardship 4485, 4487 [Juror 6208]; 18 CT Hardship 4830, 4832 [Juror 6067]; 24 CT Hardship 6718, 6720 [Juror 7138]; 26 CT Hardship 7271, 7273 [Juror 6901]; 28 CT Hardship 7986, 7988 [Juror 16657]; 30 CT Hardship 8313, 8315 [Juror 16808]; 31 CT Hardship 8681, 8683 [Juror 6875]; 33 CT Hardship 9303, 9305 [Juror 8244]; 35 CT Hardship 9947, 9949 [Juror 29770]; 37 CT Hardship 10568, 10570 [Juror 29667]; 39 CT Hardship 11007, 11009 [Juror 29763]; 40 CT Hardship 11332, 11334 [Juror 16747]; 50 CT Hardship 14372, 14374 [Juror 8618]; 50 CT Hardship 14395, 14397 [Juror 8723]; 51 CT Hardship 14625, 14627 [Juror 9993]; 51 CT Hardship 14648, 14650 [Juror 24038]; 57 CT Hardship 16419, 16421 [Juror 1235]; 60 CT Hardship 17247, 17249 [Juror 6409]; 63 CT Hardship 18373, 18375 [Juror 6639]; 76 CT Hardship 22145, 22147 [Juror 11849]; 77 CT Hardship 22466, 22468 [Juror 11821]; 82 CT Hardship 24075, 24077 [Juror 11803]; 83 CT Hardship 24328, 24330 [Juror 11950]; 85 CT Hardship 24857, 24859 [Juror 12112]; 87 CT Hardship 25524, 25526 [Juror 2606].)

During hardship voir dire, 188 prospective jurors indicated in their questionnaire

that they strongly *opposed* the death penalty. Of these 188 jurors, 110 (or 58%) believed Mr. Peterson was guilty. (*See* 2 CT Hardship 201, 203 [Juror 260]; 3 CT Hardship 477, 479 [Juror 4523]; 7 CT Hardship 1512, 1514 [Juror 21269]; 7 CT Hardship 1696, 1698 [Juror 4845]; 7 CT Hardship 1719, 1721 [Juror 21241]; 9 CT Hardship 2156, 2158 [Juror 2893]; 10 CT Hardship 2595, 2597 [Juror 21315]; 10 CT Hardship 2641, 2643 [Juror 4750]; 12 CT Hardship 2988, 2990 [Juror 5838]; 12 CT Hardship 3151, 3153 [Juror 8131]; 13 CT Hardship 3357, 3359 [Juror 113]; 13 CT Hardship 3403, 3405 [Juror 29298]; 13 CT Hardship 3426, 3428 [Juror 667]; 14 CT Hardship 3633, 3635 [Juror 237]; 15 CT Hardship 4001, 4003 [Juror 8141]; 15 CT Hardship 4024, 4026 [Juror 5815]; 15 CT Hardship 4139, 4141 [Juror 29314]; 16 CT Hardship 4254, 4256 [Juror 4920]; 17 CT Hardship 4531, 4533 [Juror 879]; 17 CT Hardship 4577, 4579 [Juror 6189]; 17 CT Hardship 4623, 4625 [Juror 6205]; 18 CT Hardship 4853, 4855 [Juror 6054]; 20 CT Hardship 5612, 5614 [Juror 6180]; 22 CT Hardship 5958, 5960 [Juror 836]; 22 CT Hardship 6120, 6122 [Juror 8135]; 23 CT Hardship 6304, 6306 [Juror 7208]; 24 CT Hardship 6811, 6813 [Juror 6949]; 26 CT Hardship 7386, 7388 [Juror 7134]; 27 CT Hardship 7432, 7434 [Juror 5983]; 27 CT Hardship 7526, 7528 [Juror 6177]; 28 CT Hardship 7849, 7851 [Juror 16637]; 28 CT Hardship 7918, 7920 [Juror 17958]; 29 CT Hardship 8129, 8131 [Juror 16748]; 29 CT Hardship 8152, 8154 [Juror 18040]; 30 CT Hardship 8428, 8430 [Juror 16820]; 33 CT Hardship 9234, 9236 [Juror 8467]; 33 CT Hardship 9257, 9259 [Juror 29520]; 33 CT Hardship 9326, 9328 [Juror 643]; 34 CT Hardship 9625, 9627 [Juror 658]; 36 CT Hardship 10292, 10294 [Juror 29735]; 38 CT Hardship 10754, 10756 [Juror 796]; 38 CT Hardship 10800, 10802 [Juror 8624]; 39 CT Hardship 11030, 11032 [Juror 29664]; 39 CT Hardship 11099, 11101 [Juror 8386]; 39 CT Hardship 11125, 11127 [Juror 16644]; 40 CT Hardship 11286, 11288 [Juror 16716]; 41 CT Hardship 11654, 11656 [Juror 534]; 41 CT Hardship 11700, 11702 [Juror 9512]; 42 CT Hardship 11933, 11935 [Juror 9834]; 42 CT Hardship 12002, 12004 [Juror 477]; 44 CT Hardship 12509, 12511 [Juror 9494]; 44 CT Hardship 12624, 12626 [Juror 29495]; 44 CT Hardship 12716, 12718 [Juror 9546]; 44 CT Hardship 12739, 12741 [Juror 9761]; 45 CT Hardship 12853, 12855 [Juror 702]; 45 CT Hardship 12967, 12969 [Juror 9777]; 45 CT Hardship 13013, 13015 [Juror 30688]; 47 CT Hardship 13380, 13382 [Juror 9710]; 48 CT Hardship 13702, 13704 [Juror 10368]; 48 CT Hardship 13841, 13843 [Juror 24029]; 48 CT Hardship 13933, 13935 [Juror 23930]; 49 CT Hardship 14096, 14098 [Juror 29823]; 50 CT Hardship 14487, 14489 [Juror 8772]; 51 CT Hardship 14832, 14834 [Juror 24051]; 52 CT Hardship 15016, 15018 [Juror 23881]; 52 CT Hardship 15131, 15133 [Juror 328]; 53 CT Hardship 15154, 15156 [Juror 9985]; 53 CT Hardship 15384, 15386 [Juror 24026]; 54 CT Hardship 15591, 15593 [Juror 23858]; 54 CT Hardship 15706, 15708 [Juror 1030]; 55 CT Hardship 15775, 15777 [Juror 1172]; 55 CT Hardship 15890, 15892 [Juror 1227]; 56 CT Hardship 16235, 16237 [Juror 1309]; 58 CT Hardship 16879, 16881 [Juror 54]; 59 CT Hardship 17063, 17065 [Juror 6370]; 59 CT Hardship 17086, 17088 [Juror 1262]; 60 CT Hardship 17339, 17341

[Juror 926]; 61 CT Hardship 17615, 17617 [Juror 6875]; 62 CT Hardship 18051, 18053 [Juror 6821]; 63 CT Hardship 18143, 18145 [Juror 6652]; 64 CT Hardship 18557, 18559 [Juror 6678]; 65 CT Hardship 18741, 18743 [Juror 14526]; 66 CT Hardship 19293, 19295 [Juror 660]; 66 CT Hardship 19316, 19318 [Juror 6685]; 67 CT Hardship 19569, 19571 [Juror 1382]; 68 CT Hardship 19661, 19663 [Juror 1617]; 68 CT Hardship 19891, 19893 [Juror 1423]; 69 CT Hardship 20213, 20215 [Juror 12009]; 70 CT Hardship 20235, 20237 [Juror 11825]; 70 CT Hardship 20420, 20422 [Juror 11276]; 71 CT Hardship 20673, 20675 [Juror 783]; 71 CT Hardship 20788, 20790 [Juror 11169]; 72 CT Hardship 20857, 20859 [Juror 11173]; 72 CT Hardship 21110, 21112 [Juror 1011]; 73 CT Hardship 21225, 21227 [Juror 2]; 75 CT Hardship 21869, 21871 [Juror 192]; 77 CT Hardship 22328, 22330 [Juror 11924]; 77 CT Hardship 22443, 22445 [Juror 12064]; 78 CT Hardship 22719, 22721 [Juror 521]; 78 CT Hardship 22903, 22905 [Juror 11249]; 79 CT Hardship 22926, 22928 [Juror 1660]; 80 CT Hardship 23271, 23273 [Juror 328]; 80 CT Hardship 23386, 23388 [Juror 10290]; 81 CT Hardship 23661, 23663 [Juror 19353]; 82 CT Hardship 24006, 24008 [Juror 6559]; 84 CT Hardship 24489, 24491 [Juror 111]; 85 CT Hardship 24719, 24721 [Juror 12192]; 87 CT Hardship 25317, 25319 [Juror 12173]; 87 CT Hardship 25363, 25365 [Juror 12158]; 87 CT Hardship 25455, 25457 [Juror 12182].)

The remaining 78 of these 188 prospective jurors (or 42%) believed there was insufficient evidence of guilt. (*See* 4 CT Hardship 707, 709 [Juror 4629]; 4 CT Hardship 822, 824 [Juror 4343]; 5 CT Hardship 914, 916 [Juror 4457]; 5 CT Hardship 1006, 1008 [Juror 29891]; 5 CT Hardship 1190, 1192 [Juror 4517]; 6 CT Hardship 1282, 1284 [Juror 831]; 6 CT Hardship 1305, 1307 [Juror 4509]; 9 CT Hardship 2226, 2228 [Juror 4925]; 10 CT Hardship 2434, 2436 [Juror 4773]; 11 CT Hardship 2965, 2967 [Juror 16019]; 13 CT Hardship 3449, 3451 [Juror 875]; 13 CT Hardship 3541, 3543 [Juror 20272]; 14 CT Hardship 3679, 3681 [Juror 1110]; 14 CT Hardship 3725, 3727 [Juror 5873]; 16 CT Hardship 4369, 4371 [Juror 21271]; 19 CT Hardship 5267, 5269 [Juror 9470]; 20 CT Hardship 5635, 5637 [Juror 12602]; 21 CT Hardship 5658, 5660 [Juror 516]; 21 CT Hardship 5865, 5867 [Juror 6378]; 24 CT Hardship 6557, 6559 [Juror 6908]; 24 CT Hardship 6580, 6582 [Juror 7016]; 24 CT Hardship 6603, 6605 [Juror 6746]; 25 CT Hardship 6880, 6882 [Juror 7103]; 25 CT Hardship 6903, 6905 [Juror 7047]; 26 CT Hardship 7294, 7296 [Juror 6891]; 27 CT Hardship 7457, 7459 [Juror 1018]; 27 CT Hardship 7549, 7551 [Juror 6184]; 27 CT Hardship 7665, 7667 [Juror 17952]; 28 CT Hardship 7757, 7759 [Juror 18021]; 29 CT Hardship 8382, 8384 [Juror 16708]; 30 CT Hardship 8497, 8499 [Juror 18113]; 31 CT Hardship 8704, 8706 [Juror 6881]; 33 CT Hardship 9211, 9213 [Juror 8199]; 34 CT Hardship 9487, 9489 [Juror 8505]; 34 CT Hardship 9556, 9558 [Juror 29586]; 34 CT Hardship 9579, 9581 [Juror 29531]; 35 CT Hardship 9855, 9857 [Juror 29534]; 36 CT Hardship 10154, 10156 [Juror 630]; 36 CT

Hardship 10315, 10317 [Juror 29745]; 37 CT Hardship 10545, 10547 [Juror 29650]; 37 CT Hardship 10591, 10593 [Juror 8586]; 38 CT Hardship 10731, 10733 [Juror 1393]; 41 CT Hardship 11631, 11633 [Juror 9819]; 41 CT Hardship 11771, 11773 [Juror 9555]; 41 CT Hardship 11795, 11797 [Juror 11795]; 42 CT Hardship 11910, 11912 [Juror 9766]; 45 CT Hardship 12762, 12764 [Juror 9576]; 46 CT Hardship 13128, 13130 [Juror 9638]; 47 CT Hardship 13357, 13359 [Juror 9619]; 47 CT Hardship 13495, 13497 [Juror 23986]; 48 CT Hardship 13725, 13727 [Juror 10380]; 48 CT Hardship 13818, 13820 [Juror 24126]; 52 CT Hardship 14855, 14857 [Juror 23943]; 52 CT Hardship 15085, 15087 [Juror 23960]; 53 CT Hardship 15223 , 15225 [Juror 23864]; 53 CT Hardship 15269, 15271 [Juror 23878]; 54 CT Hardship 15683, 15685 [Juror 6361]; 55 CT Hardship 15844, 15846 [Juror 9691]; 57 CT Hardship 16396, 16398 [Juror 1250]; 57 CT Hardship 16488, 16490 [Juror 1294]; 57 CT Hardship 16511, 16513 [Juror 573]; 59 CT Hardship 17040, 17042 [Juror 6451]; 59 CT Hardship 17178, 17180 [Juror 449]; 60 CT Hardship 17500, 17502 [Juror 1323]; 65 CT Hardship 18833, 18835 [Juror 647]; 66 CT Hardship 19040, 19042 [Juror 6533]; 66 CT Hardship 19270, 19272 [Juror 853]; 68 CT Hardship 19753, 19755 [Juror 1528]; 69 CT Hardship 20144, 20146 [Juror 1586]; 70 CT Hardship 20443, 20445 [Juror 15972]; 70 CT Hardship 20466, 20468 [Juror 11761]; 78 CT Hardship 22696, 22698 [Juror 11219]; 78 CT Hardship 22788, 22790 [Juror 372]; 79 CT Hardship 23041, 23043 [Juror 283]; 80 CT Hardship 23294, 23296 [Juror 11332]; 80 CT Hardship 23409, 23411 [Juror 384]; 81 CT Hardship 23615, 23617 [Juror 12021]; 85 CT Hardship 24903, 24905 [Juror 12196].)

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule 8.360(b), I certify under penalty of perjury that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 41891 words in the brief.

Dated: July 23, 2015 /s Cliff Gardner

Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Avenue, Berkeley, CA 94606. I am not a party to this action.

On July 23, 2015 I served the within

**APPELLANT'S REPLY BRIEF**

upon the parties named below by depositing a true copy in a United States mailbox in Oakland, California, in a sealed envelope, postage prepaid, and addressed as follows:

Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

California Appellate Project
101 2nd Street
San Francisco, CA 94105

Office of the District Attorney
832 12th Street
Suite 300
Modesto, CA 95354

Lawrence Gibbs
P. O. Box 7639
Berkeley, CA 94707

Scott Peterson
V-72100
San Quentin State Prison
San Quentin, CA 94974

Superior Court
800 11th Street
P. O. Box 3488
Modesto, CA 95353

I declare under penalty of perjury that the foregoing is true.

Executed on July 23, 2015, in Berkeley, California.

/s Cliff Gardner
Declarant